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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 21

THE UNITED STATES, PETITIONER

vs.

ATLANTIC MUTUAL INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED APRIL 12, 1935

CERTIORARI GRANTED MAY 20, 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 869

THE UNITED STATES, PETITIONER

vs.

ATLANTIC MUTUAL INSURANCE COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In Court of Claims of the United States

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ATLANTIC MUTUAL INSURANCE COMPANY, CLAIMANT

Against

UNITED STATES OF AMERICA, DEFENDANT

I. *Petition*

Filed February 18, 1929

TO THE COURT OF CLAIMS:

The claimant, Atlantic Mutual Insurance Company, respectfully shows to this honorable court as follows:

First. At all the times hereinafter mentioned the claimant, Atlantic Mutual Insurance Company, was and still is a corporation duly organized and existing under the laws of the State of New York, with its principal office at No. 49–51 Wall Street, New York City, New York, and duly authorized by its charter and by the law of the State of New York to underwrite marine insurance risks, including fire, upon goods.

Second. On information and belief, at all the times hereinafter mentioned the defendant United States of America was the owner of and operating and in control of the transport "Logan."

Third. On or before the 5th day of December 1918 the
2 claimant made a contract of insurance with, and in consideration of a premium paid or agreed to be paid, issued to the Manila Railroad Company, a policy of insurance against marine perils, including fire, covering a certain shipment of goods owned by the Manila Railroad Company to be carried upon said transport "Logan" from San Francisco, California, sailing in the month of December 1918, to Manila, Philippine Islands.

Fourth. On or before the 5th day of December 1918 the claimant made a contract of insurance with, and in consideration of a premium paid or agreed to be paid, issued to the Government of the Philippine Islands, a policy of insurance against marine perils, including fire, covering a certain shipment of goods owned by the Government of the Philippine Islands, to be carried on the said transport "Logan" from San Francisco, California, sailing in December 1918, to Manila, Philippine Islands.

Fifth. Upon information and belief, both of said shipments of goods were loaded on the said transport "Logan" at San Francisco, California, on or before December 5, 1918, and were received on board said transport by the duly authorized representative of the defendant for carriage to Manila, and the defendant agreed to carry

the same from the Port of San Francisco to Manila, Philippine Islands.

Upon information and belief, on or about the 5th day of December 1918, said transport "Logan" sailed from the Port of San Francisco, California, for Manila, Philippine Islands, with both of said shipments of goods, together with other goods, on board.

3 Sixth. Upon information and belief, on or about the 16th day of December 1918, and again on or about the 22nd day of December 1918 fire broke out in no. 1 lower hold of said transport "Logan" while said transport was at sea in the Pacific Ocean, and on each said occasion water was poured into said hold to extinguish said fire and to prevent the total loss of said vessel and her cargo. Said fires were thereby extinguished but said water badly damaged the said shipments of goods referred to in paragraphs "third" and "fourth" hereof.

Seventh. Upon information and belief, upon arrival of said transport "Logan" at Manila, Philippine Islands, her cargo was discharged at said port. At said port, however, the master of said transport permitted all the cargo on board said transport to be unloaded and to be delivered to the owners and/or consignees thereof without requiring or obtaining from said owners and/or consignees any bond or bonds to secure the payment of general average by said goods.

Eighth. Thereafter claims were presented to the Atlantic Mutual Insurance Company by or on behalf of the government of the Philippine Islands and the Manila Railroad Company for the amounts of their respective losses upon their said shipments of goods, as due and payable to them under said policies of insurance by reason of the facts aforesaid. Thereafter the Atlantic Mutual Insurance Company, pursuant to said claims and policies of insurance, made payments as follows: On September 17, 1919, $3,263 was paid on account to the government of the Philippine

4 Islands; on April 16, 1920, $25,000 was paid on account to the government of the Philippine Islands; and on April 12, 1921, the sum of $9,326.80 was paid to the government of the Philippine Islands, and $1,407.22 was paid to the Manila Railroad Company. The aforesaid sums constituted payment in full of all losses claimed by each of said assured under said policies.

Ninth. By reason of the facts aforesaid, all claims of the government of the Philippine Islands and of the Manila Railroad Company, respectively, against the defendant for contribution in general average arising out of the facts hereinabove alleged, were transferred by operation of law to, and became vested in, the Atlantic Mutual Insurance Company by subrogation and the Atlantic Mutual Insurance Company became entitled to bring suit in its own name for recovery of such general average contributions.

Tenth. Thereafter and on or about May 6, 1920, the Chief of the Transport Service of the War Department wrote to the Chief

of the Bureau of Insular Affairs, stating that the War Department would bear its share of any general average adjustment made to cargo by reason of the facts aforesaid. A copy of said letter is annexed hereto and marked "Exhibit A."

Eleventh. The claimant herein thereafter and on or about March 15, 1921, presented to the defendant herein claim and demand for payment of the general average contribution owing to the claimant herein by reason of the facts aforesaid. Thereafter

5 hearing were held by a board of inquiry of the War Department, which board denied the claim. The cause was thereafter reviewed, however, by the Judge Advocate General, who reversed the decision of the said board of inquiry and held that general average was properly payable to the claimant herein.

Twelfth. Thereupon and in or about the month of August 1922 the War Department requested Johnson & Higgins, average adjusters, to prepare a general average statement covering all general average contributions to be paid and/or received by reason of the facts hereinabove alleged. Johnson & Higgins undertook the preparation of a general average statement, and completed said statement and issued the same on or about December 31, 1926.

Said general average statement stated the contributory values of the various interests involved in said general average on said voyage of the said transport "Logan" as follows:

Hull: The contributory value of said vessel in sound condition was stated to be	$475,000
Cargo:	
Cargo shipped by the War Department of the defendant	669,068
Cargo of the American Red Cross	260,331
Cargo of the Philippine Islands Government and the Manila Railroad Company	190,503
Personal property of Colonel S. E. Allen	1,851
Personal property of Knute A. Johnston	445

6 The foregoing contributory values included the amounts to be made good in general average.

Said general average statement also showed that net contributions were to be paid as follows:

By the War Department of the defendant for miscellaneous cargo owned by it	$19,971.81
By the American Red Cross for miscellaneous cargo	12,174.66
By the defendant herein as owner of the hull of the transport "Logan"	22,213.88
Total	54,360.35

Said general average statement also showed that net contributions were to be received as follows:

For miscellaneous cargo owned by the government of the Philippine Islands and the Manila Railroad Company (to which sums the claimant herein is entitled by subrogation as hereinabove alleged)	$28,099.46
Colonel S. E. Allen, for personal property	1,429.25
Knute A. Johnston, for personal property	644.76
To Johnson & Higgins for fee and disbursements in preparing statement	2,365.12
To ditto for commissions as settling agents	1,821.82
	54,360.35

7 Thirteenth. Upon information and belief, the computation and statement of general average as contained in said statement prepared and issued by Johnson & Higgins is true and correct, and correctly states the amounts of general average contribution due and owing by and to the respective interests as therein shown.

Fourteenth. Thereafter and on or about May 28, 1928, the General Accounting Office notified the claimant herein that its said claim for allowance and payment of general average had been rejected. A copy of said notice is annexed hereto and marked "Exhibit B."

Fifteenth. Thereafter the claimant made application to the General Accounting Office for a reivew of the disallowance of said claim and for the allowance of said claim as a valid debt and obligation of the defendant herein. On or about December 10, 1928, the Comptroller General of the United States notified the claimant herein that the disallowance of said claim had been sustained, and refused, on behalf of the defendant, to pay said claim or any part thereof.

Sixteenth. The claimant and the government of the Philippine Islands and the Manila Railroad Company have always borne true allegiance to the Government of the United States, and have not in any way aided, abetted or encouraged any rebellion against the United States. No assignment or transfer of this claim or of any part thereof or interest therein has been made by any person
8 whatsoever except as stated herein. The claimant is justly entitled to the amount herein claimed, after allowing all just credits and offsets. No action upon this claim other than hereinbefore set forth has been taken before Congress or any department of the Government, or in any court; nor has the claimant assigned said claim or any part thereof to any person whatsoever.

Seventeenth. The premises considered, your claimant prays that judgment be entered in favor of the Atlantic Mutual Insurance Company against the United States of America in the sum of forty-eight thousand ninety-nine and 40/100 dollars ($48,099.40), together with interest at the rate of six percent (6%) per annum thereon from the 31st day of December 1926, and for such other and further relief as may be required.

CARTER, LEDYARD & MILBURN,
Proctors for Claimant.
54 Wall Street, Borough of Manhattan, City of New York.
HEBER SMITH,
Counsel.

9 [*Duly sworn to by Cornelius Eldert, jurat omitted in printing.*]

10 *Exhibit A to petition*

WAR DEPARTMENT,
TRANSPORTATION SERVICE,
Washington, May 6, 1920.

File No. T. S. 579.14 "Logan."
From: Chief of Transportation Service.
To: Chief, Bureau of Insular Affairs, Washington, D. C.
Subject: Damage to shipment on board U. S. A. T. "Logan."

1. Your letter of April 27, 1920, addressed to the Quartermaster General, U. S. Army, has been referred to this office for reply.

2. It is desired to advise that the War Department will bear its share of any general average adjustment made on account of loss by fire of cargo on the U. S. A. T. "Logan."

3. The matter is now in the course of investigation with the view of ascertaining the amount, if any, properly attributable to general average loss. Until this is definitely ascertained it is impossible to say what proportion the War Department will agree to bear as a general average contribution.

FRANK T. HINES,
Brigadier General, U. S. A.
Chief of Transportation Service.

11 *Exhibit B to petition*

General Accounting Office Division. Form 7009. In reply refer to certificate no. ——.

Notice of disallowance of claim, civil

GENERAL ACCOUNTING OFFICE,
CLAIMS DIVISION,
Washington, D. C., May 28, 1928.

Claim No. 0187408.
ATLANTIC MUTUAL INSURANCE CO.
% Carter, Ledyard & Milburn,
54 Wall Street, New York, N. Y.

Your claim(s) for $48,099.40, contribution in general average as insurers of the property of Philippine Islands government and the Manila Railroad Company damaged by fire on board the U. S. A. T. "Logan" on or about December 18, 1918, has (have) been examined and disallowed, per the above certificate number, for the following reasons:

There is no liability on the government for general average contribution for cargo lost or damaged in connection with fires which occurred on the U. S. A. T. "Logan" in December 1918, as the
12 vessel and all cargo aboard were property of the United States.

Therefore the claimants, as insurers of the cargo consigned to the Philippine Islands government and the Manila Railroad,

are not entitled to contribution in general average which would be the equivalent to the United States paying for the loss of property on which it carried insurance against such loss.

J. R. McCARL,
Comptroller General.
By ORLANDO F. SYKES.

sdp

If a claimant desires a review of this settlement, or any item thereof, application should be filed with a statement of the reasons therefor, within one year from the date hereof, in the Division, General Accounting Office, and same will be transmitted to the Law Division, Office of Comptroller General, for review.

13 II. *History of proceedings*

On March 11, 1929, the defendant filed a motion to dismiss the petition.

On March 30, 1929, the plaintiff filed an affidavit in opposition to said motion.

On May 6, 1929, the defendant's motion to dismiss was overruled, in open court, and the case remanded to the general docket.

III. *General traverse*

Filed by leave of Court September 3, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

The United States further pleads the action is barred upon limitation grounds.

HERMAN J. GALLOWAY,
Assistant Attorney General.

IV. *Further proceedings in the case*

On September 9, 1933, the defendant filed a motion for leave to file a motion to dismiss the petition.

On September 18, 1933, the plaintiff filed its opposition to said motion.

On September 22, 1933, the defendant filed a reply to said opposition.

On September 26, 1933, the motion for leave to file a motion to dismiss was ordered to the Law Calendar.

On October 9, 1933, the motion was argued and submitted.

On October 18, 1933, the motion was overruled without prejudice.

14 V. *Argument and submission on merits*

On January 9, 1934, the case was argued and submitted on merits by Mr. J. M. Richardson Lyeth, for plaintiff, and by Mr. J. Frank Staley, for defendant.

VI. *Special findings of fact, conclusion of law, and opinion of the court by Whaley, J.*

Filed November 5, 1934

Mr. J. M. Richardson Lyeth for the plaintiff. Mr. Rush Taggart and Carter, Ledyard & Milburn were on the briefs.

Mr. J. Frank Staley with whom was Mr. Assistant Attorney General Frank J. Wideman for the defendant. Mr. Lucian Y. Ray was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

Special findings of fact

1. The plaintiff, Atlantic Mutual Insurance Company, was at the times involved herein, and still is, a corporation duly organized and existing under the laws of the State of New York, with its principal office at no. 49–51 Wall Street, New York City, and duly authorized by its charter and by the law of the State of New York to underwrite marine insurance risks, including fire, upon goods.

The plaintiff in this action seeks to recover from the United States the sum of $48,099.40 alleged to be due for contribution in general average, by way of subrogation, as reimbursement of insurance moneys paid to the government of the Philippine Islands and the Manila Railroad Company (a Philippine government-owned corporation) to cover losses sustained on certain of their property, a part of which was jettisoned, burned, and damaged while being transported from the United States to the Philippine Islands in December 1918 on the United States Army transport "Logan."

2. The Philippine Islands are insular possessions of the United States and their affairs in the United States are under the administration of the Bureau of Insular Affairs. The Manila Railroad Company is a business corporation organized under the laws of the State of New Jersey and doing business in the Philippine Islands. All of its capital stock is owned by the government of the Philippine Islands.

During the period of the transactions here involved, purchases of supplies in the United States for the government of the Philippine Islands and its national railway, the Manila Railroad Com-
15 pany, were made by the Bureau of Insular Affairs of the War Department of the United States, which handled similar purchases for other possessions of the United States. The purchases

here involved were made by Harry L. Hershey, as purchasing agent, who worked under the direction and in the pay of the War Department, although reimbursement therefor was made by the Philippine and Puerto Rican governments.

3. The U. S. A. T. "Logan" was owned and operated by the United States and was used primarily for the carrying of Government supplies and the United States Army personnel, and their authorized allowances of baggage. It was operated by the Quartermaster's Department of the United States Army and/or the Army Transport Service. Its officers and crew were paid by the Quartermaster's Department of the War Department of the United States.

4. On December 5, 1918, the vessel sailed from San Francisco with cargo consigned to Vladivostok, Siberia, and the Philippine Islands. In addition to United States Government supplies there were being transported, free of charge, certain Red Cross supplies and cargo belonging to the government of the Philippine Islands and the Manila Railroad Company. The carriage of cargo for the Red Cross, the government of the Philippine Islands, and the Manila Railroad Company was arranged as a result of the war emergency which had necessitated the transfer of ships regularly operating in the commercial service in the Pacific to the Atlantic, and was subject to a notice posted on the bulletin board in the quartermaster's station at the dock at San Francisco, from which the transport "Logan" sailed upon the voyage in question, to the effect that the United States would use due care in handling goods on the transport but would not be responsible for them.

5. The shipments of goods hereinabove referred to as belonging to the government of the Philippine Islands and the Manila Railroad Company were loaded on the said transport "Logan" at San Francisco on or before December 5, 1918, and were received on board said transport by the duly authorized representative of the defendant for carriage to Manila, and the defendant undertook to carry the same from the port of San Francisco to Manila, Philippine Islands. No bill of lading was issued for either of said shipments, and the defendant did not require the payment of freight or an agreement to pay freight therefor. Both of said shipments of goods were on the transport "Logan" when she sailed from San Francisco on December 5, 1918, as hereinabove stated.

6. On or before the 5th of December 1918 plaintiff made a contract of insurance with, and, in consideration of a premium paid or agreed to be paid, issued to the Manila Railroad Company a policy of insurance against marine perils, including fire, covering a certain shipment of goods owned by the Manila Railroad Company to be carried upon said transport "Logan" from San Francisco, California, sailing in the month of December 1918 to Manila, Philippine Islands. Said goods consisted of miscellaneous supplies.

On or before December 5, 1918, plaintiff made a contract of insurance with, and, in consideration of a premium paid or agreed to be paid, issued to the government of the Philippine Islands, a policy

of insurance against marine perils, including fire, covering
16 a certain shipment of goods owned by the government of the Philippine Islands, to be carried on the said transport "Logan" from San Francisco, California, sailing in December 1918 to Manila, Philippine Islands. Said goods consisted of miscellaneous supplies—principally stationery, books, and medical supplies.

The insurance hereinabove referred to was procured on behalf of the government of the Philippine Islands and the Manila Railroad Company by said Harry L. Hershey as purchasing agent in the United States for the Government of the Philippine Islands and the Manila Railroad Company.

7. At 8:30 p. m. on December 16, 1918, when the transport was about 700 miles northwest of Honolulu, fire was discovered in its lower hold no. 1, which hold was loaded full with cargo. In order to extinguish the fire and to prevent a total loss of the vessel and her cargo, it was necessary to use steam and to flood the hold with water by hose from the deck and through the bilge pipes from the bottom. The cargo in this hold was badly damaged by fire and water, and parts of it had all identifying marks destroyed. On the morning of December 18th, after the fire had been extinguished, the debris and such of the cargo as was damaged to such an extent as to be considered worthless, was thrown overboard, and the transport proceeded on its way. On December 22nd fire broke out again in the same hold and was not completely extinguished until December 23rd, at which time additional damaged cargo was thrown overboard.

8. A board of officers appointed at sea to determine the origin of the fire found that it was due to spontaneous combustion caused by linseed oil coming in contact with packages of cotton bandages and cotton mattresses stowed in close proximity to the oil and paint. A second board of officers was convened after the transport arrived at destination to determine the cause of the fire and the extent of the damage to the cargo. This board verified the findings of the previous board that the fire was caused by spontaneous combustion and further found that the same was due to the negligence of no one.

9. The transport "Logan" arrived at Vladivostok January 4, 1919, and there discharged part of her cargo. Sailing thence she arrived at Manila January 19, 1919, where the remainder of her cargo was discharged. At said ports the master of the transport permitted the cargo to be unloaded and delivered to owners and consignees without requiring or obtaining from them any bond or bonds to secure the payment of general average.

10. Thereafter claims were presented to the Atlantic Mutual Insurance Company by or on behalf of the government of the Philippine Islands and the Manila Railroad Company for the amounts of their respective losses upon their said shipments of goods, as due and payable to them under said policies of insurance by reason of the facts aforesaid. Thereafter, the Atlantic Mutual Insurance Company, pursuant to said claims and policies of insurance, made pay-

ments as follows: On September 17, 1919, $3,263 was paid on account to the government of the Philippine Islands; on April 16, 1920, $25,000 was paid on account to the government of the Philippine Islands; and on April 12, 1921, the sum of $9,326.80 was paid to the government of the Philippine Islands, and $1,407.22 was paid to the Manila Railroad Company. The aforesaid sums, totaling
17 $38,997.02, constituted payment in full of all losses claimed by each of said assured under said policies.

11. Neither the Philippine government nor the Manila Railroad Company at any time presented a claim for loss or damage or general average to the United States Government covering the shipments made aboard the "Logan."

12. On May 6, 1920, Frank T. Hines, brigadier general, United States Army, and Chief of Transportation Service, addressed the following letter to the Chief, Bureau of Insular Affairs, Washington, D. C., on the subject of damage to shipment on board U. S. A. T. "Logan."

"Your letter of April 27, 1920, addressed to the quartermaster general, U. S. Army, has been referred to this office for reply.

"It is desired to advise that the War Department will bear its share of any general-average adjustment made on account of loss by fire of cargo on the U. S. A. T. 'Logan.'

"The matter is now in the course of investigation with the view of ascertaining the amount, if any, properly attributable to general-average loss. Until this is definitely ascertained it is impossible to say what proportion the War Department will agree to bear as a general-average contribution."

13. The plaintiff thereafter and on or about March 15, 1921, presented to the defendant claim and demand for payment of the general-average contribution alleged by plaintiff to be owing to it by reason of the facts aforesaid. Thereafter hearings were held by a board of inquiry of the War Department, which board denied the claim. The claim was thereafter reviewed by the Judge Advocate General, who reversed the decision of the board of inquiry and held that general average was properly payable to the plaintiff.

14. On August 22, 1922, the following letter was addressed to Johnson & Higgins, average adjusters, San Francisco, California, by the office of the general superintendent of the zone general-supply depot, Army Transport Service, War Department, Fort Mason, San Francisco, over the signature of Hugh Williams, captain, Q. M. C., administrative officer, A. T. S.:

"1. Enclosed is file of papers having reference to loss of cargo shipped from San Francisco to Vladiostok and Manila on the United States Army Transport 'Logan', voyage leaving San Francisco December 5th, 1918, the loss being caused by fire which occurred in the hold of the ship on December 16th and 17th, 1918.

"2. It is requested that the necessary action be taken to prepare a statement of general average in order that the responsibility of the various parties concerned may be determined."

Johnson & Higgins undertook the preparation of a general-average statement, and completed said statement and issued the same on or about December 31, 1926. A copy of the said statement of general average is in evidence as plaintiff's exhibit 8 and is by reference made a part hereof.

Said general-average statement stated the contributory values of the various interests involved in said general average on said voyage of the said transport "Logan" as follows:

Hull:	
The contributory value of said vessel in sound condition was stated to be	$475,000
Cargo:	
Cargo shipped by the War Department of the defendant	669,068
Cargo of the American Red Cross	260,331
Cargo of the Philippine Islands government and the Manila Railroad Company	190,503
Personal property of Colonel S. E. Allen	1,851
Personal property of Knute A. Johnston	445

Said general-average statement also showed that net contributions were to be paid as follows:

By the War Department for miscellaneous cargo owned by it	$19,971.81
By the American Red Cross for miscellaneous cargo	12,174.66
By the defendant as owner of the hull of the transport "Logan"	22,213.88
Total	54,360.35

Said general-average statement also showed that net contributions were to be received as follows:

For miscellaneous cargo owned by the government of the Philippine Islands and the Manila Railroad Co. (for which sums the plaintiff herein is suing in this suit)	$48,099.40
Colonel S. E. Allen, for personal property	1,429.25
Knute A. Johnston, for personal property	644.76
To Johnson & Higgins for fee and disbursements in preparing statement	2,365.[illegible]
To ditto for commissions as collecting and settling agents	1,821.[illegible]
Total	54,360.35

15. The computation and statement of general average as contained in said statement prepared and issued by Johnson & Higgins correctly states the amounts of the contributory values of the various interests involved in said general average on said voyage of the transport "Logan."

16. On or about May 28, 1928, the General Accounting Office notified the plaintiff herein that its said claim for allowance and payment of general average had been rejected. A copy of said notice of disallowance of claim is attached to the plaintiff's petition as exhibit B and is by reference made a part hereof.

17. Thereafter the plaintiff made application to the General Accounting Office for a review of the disallowance of said claim and for the allowance of said claim as a valid debt and obligation of the defendant herein. On or about December 10, 1928, the Comptroller General of the United States notified the plaintiff that the disallowance of said claim had been sustained and refused on behalf of the defendant to pay said claim or any part thereof.

18. In the years 1918 and 1919 it was, and still is, the general custom in adjusting general average for the debtor interests not to make payment of the amounts of their several contributions until after the general-average statement had been prepared and issued, and likewise for the creditor interests not to receive payment of their several contributions until after the general-average statement had been prepared and issued. Said custom applied to voyages in the Pacific Ocean and to ports in the Philippine Islands, including Manila.

19 *Conclusion of law*

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $48,099.40.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of forty-eight thousand ninety-nine dollars and forty cents ($48,099.40).

Opinion

WHALEY, Judge, delivered the opinion of the court:

This is a maritime claim and is governed by the rules of the maritime law as accepted and adopted by the courts of admiralty in this country.

The facts show that the vessel was owned and operated by the Government through the War Department. She was a public ship and used for governmental purposes. During the World War all, or most, of the private merchant ships which formerly operated in the Pacific Ocean were taken over by the Government through requisition and transferred to the Atlantic Ocean for the purpose of transporting troops and supplies to the Army in France. This resulted in a shortage, or absence, of all freight space in ships sailing to the Orient.

In December 1918 the Government agreed to transport, without hire, certain goods and chattels of the Red Cross, Philippine Government, and the Manila Railroad to the ports of Vladivostok and Manila on its Army transport, the S. S. "Logan." This vessel was carrying supplies to the U. S. Army in Siberia and the Philippines and also certain Army officers and their authorized allowances of baggage. The shipments of goods of the Philippine Government and the Manila Railroad Company were insured by the plaintiff against marine perils. On December 5, 1918, the transport "Logan" sailed from San Francisco, California, to Vladivostok, Siberia, and the Philippine Islands. After the ship had been at sea for over ten days, a fire broke out in the lower hold no. 1, and, to prevent the loss of the vessel and cargo, it was necessary to flood the hold with water from the deck and through the bilge pipes from the bottom. After the fire, some of the damaged cargo was jettisoned and the voyage was resumed. On December 22, only five days after

the resumption of the voyage, fire again broke out in the same hold and was not extinguished until the following day. As a result of this fire additional cargo was thrown overboard. Upon the arrival of the transport at the ports of destination, her cargo was discharged, and the master made delivery to the owners or consignees without taking bonds to secure payment of general average contributions by said cargo. There was no effort made to libel in rem the ship or cargo. Thereafter the plaintiff paid the Philippine Islands and the Manila Railroad Company the amounts of their respective losses, as due and payable under the policies of insurance, and became subrogated to their rights.

The War Department, acting through the Army Transport Service, employed Johnson & Higgins, average adjusters, on August 22, 1922, to prepare a statement of general average to determine the responsibility of the various parties. The general-average
20 statement was completed and issued by these adjusters on December 31, 1926, and showed the ship and cargo owned by the Government should contribute to the loss sustained through the destruction of the part of the cargo owned by the Philippine Islands and the Manila Railroad Company in the sum of $42,185.69.

The plaintiff, having paid the loss under the marine-insurance policies as an underwriter, brings this suit to recover from the defendant the contribution the ship and cargo owned by the Government should make in general average. Liverpool & Great Western Steam Company v. Phenix Insurance Co., 129 U. S. 397; Wager v. Providence Ins. Co., 150 U. S. 99; International Navigation Company v. Atlantic Mutual Insurance Company, 100 Fed. 304.

The defense interposed by the Government is (1) that the cause of action accrued upon the arrival of the vessel at the port of destination on January 19, 1919, and suit was not commenced until February 18, 1929, and (2) that the transport "Logan", being a public ship devoted to military service, the rule of general average is inapplicable.

This is an action in personam and not an action in rem. There was no attempt to libel the vessel or cargo owned by the Government. There has been no interruption by any process issuing from a court of admiralty to the freedom of action of the transport. No act of sovereignty over this ship has been touched. No process could issue from a judicial tribunal which could affect the movements of this instrumentality of the National Government. Briggs v. Lightboat Upper Cedar Point, 93 Mass. Reports, 11 Allen, 157. See also Workman v. New York City, 179 U. S. 552; Ex Parte in the matter of the State of New York, et al., 256 U. S. 503 and cases cited. It is important that this fact should be borne in mind while considering the legal questions involved. The material facts are not in dispute. The language in which some of these facts are expressed seems to occasion a slight dissension.

The defendant asserts that this court is without jurisdiction, for the reason the petition was filed more than six years after the ar-

rival of the vessel at Manila; in other words, that the cause of action to collect contribution in general average accrued upon the arrival of the vessel at the port of delivery of the cargo and not upon the completion and issuance of the general average statement made by the owners of the vessel. There is ample authority that were this a private merchant vessel a libel in rem could have been commenced against the ship by the cargo owners and by the ship owners against the cargo for contribution in general average upon arrival at destination. Dupont v. Vance, 19 How. 162; Wellman et al. v. Morse et al., 76 Fed. 573.

Under the admiralty law it was the duty of the master to take security bonds from the cargo owners for general-average contributions before delivery of the cargo to owners or consignees. "The Santa Ana", 154 Fed. 800.

The master of the "Logan" did not require the execution of bonds. Bonds are taken in order to prevent the tying up of either ship or cargo and to forego the legal entanglements resulting from libels in rem. It is fair to assume that the master of the transport was aware that no libel in rem against a public ship could issue from an admiralty court. The plaintiff commenced this action in
21 personam seasonably from the issuance of the general average statement which the Government made, but the action would be beyond the limitation of time for the commencement of a suit in this court if the time commenced to run from the arrival of the ship at Manila. The jurisdiction of this court depends upon which date the claim first accrued. As there could be no attachment of the ship for the purpose of enforcing a lien for contribution in general average, there could only remain the liability of the ship and cargo for general average contribution through the right of action against the owners, if such remedy existed. If the "Logan" were a privately owned merchant ship, the lien on the ship and cargo would be inchoate until an average adjustment had been made and no action for a general-average charge could be maintained until the general-average statement had been prepared and issued. "The Allianca", 64 Fed. 871.

The Government was in duty bound to have a general-average statement prepared and, in performing this duty, it employed a recognized firm of average adjusters. The length of time taken for the compilation and rendition of this general average statement is readily explained when the circumstances of this case are considered. The adjusters were the agents of the owner of the ship and were acting for the Government. No action against the owner could be maintained until the liability was ascertained and, as it was the duty of the owner of the ship to the owners of the cargo to have a general-average statement prepared (Johnson & Higgins v. The United States, 287 U. S. 459), until this duty had been performed or a refusal by the owner to perform this duty, an action in personam would not lie. The general-average statement prepared by the owner is in the nature of an account stated and a right of action

accrues from the time of its submission. There are no cases directly in point for the reason that a lien attaches to private ships and no lien attaches to public vessels and this lien takes hold upon the arrival at destination. We have been unable to find a case where an action in personam was commenced upon the arrival of a ship at destination. As an action in rem gives a lien on the ship and cargo and an action in personam gives no such lien, the former is always employed to gain the advantage of security for payment of the loss or damage. The action in personam relies upon the responsibility of the owner alone.

The defendant relies on the case of Det Forenede Damp-skibs Selskab v. Insurance Company of North America, 31 Fed. (2d) 658. We do not consider this case as either controlling or actually bearing on the question here involved. There was no statute of limitations (in admiralty, laches) involved, but solely the question as to what period should govern the value of certain currency mentioned in the bonds given for general-average contribution. The learned judge correctly held that the value was to be fixed at the time the bonds were executed which was upon the arrival of the vessel at the port of destination. What was said about general-average adjustment was merely obiter and had no bearing on the only question involved. In our opinion, the true rule and the only one which appeals to reason and common justice is that set forth in the decisions in "The Allianca", supra; Leggett v. 500 Cases of Tomatoes et al., 15 Fed. (2d) 270; "The Emilia S. de Perez", 22 Fed. (2d) 585, 586; "The Ernestina", 259 Fed. 772, 773; "The Santa Ana", 154 Fed. 800, 802.

22 In "The Allianca", supra, it was held that no action for a general-average charge is maintainable until an average adjustment is made, though the lien thereof was previously inchoate.

In the Leggett case, supra, it was held that "until an adjustment is made, the lien under consideration is inchoate; it attaches, but its amount cannot be ascertained until adjusted."

In the De Perez case, supra, it was held that the owner of the cargo had a right in personam against the owner of the ship for his full share of the general-average statement. This case recognizes that there is a lien given by an action in rem which accrues upon arrival of the ship and before bonds are given in general average and in addition the owner of the cargo also has a right of action in personam against the shipowner for his full contributive share of what the general-average statement shows when it has been prepared and issued. The right of action in personam accrues upon the submission of the general average statement which has been prepared by the master (representing the owners) as required by the admiralty law.

It is our opinion that the plaintiff's suit in the case at bar is timely, having been commenced within six years required by the

statute from the date of the rendition of the general-average statement prepared by the adjusters employed by the defendant.

The important question for decision is the liability of the Government of the United States in general average for a loss occasioned by the shipment of goods on a ship which is a part of the armed forces of the Government and used solely as a public vessel. No freight money was charged or received by the Government for the carriage of these shipments. Under these circumstances, does the rule of the admiralty law apply, where a clear case of general average is apparent from the facts, were the ship a privately owned merchant vessel? The fact that the cargo was carried free does not enter into the question of general average liability. In Gulf Refining Co. v. Universal Insurance Co., 32 Fed. (2d) 555, the Circuit Court of Appeals, second circuit, said: "It is authoritatively settled that general average depends upon the event of a common sacrifice for the benefit of all who are or may be interested in the voyage—not upon the existence of different contributory subjects. Contribution is a consequence. Neither the absence of a cargo nor the common ownership of vessel and cargo will affect the application of the principle of general average."

In Montgomery & Company v. Indemnity Mutual Marine Insurance Co., Ltd., 1 King's Bench 734, 740, the true principle of general average is expressed as follows: "The object of this maritime law seems to be to give the master of the ship absolute freedom to make whatever sacrifice he thinks best to avert the perils of the sea, without any regard whatsoever to the ownership of the property sacrificed; and, in our judgment, such a sacrifice is a general-average act, quite independently of unity or diversity of ownership."

There are certain requisites to make a case of general average and the Supreme Court in the case of Barnard v. Adams, 10 How. 270, 303, has stated them most clearly as follows: "The law of general average has its foundation in equity. The principle that 'what is given for the general benefit of all shall be made good by the contribution of all' is recommended, not only by its equity but
23 also by its policy, because it encourages the owner to throw away his property without hesitation in time of need.

"In order to constitute a case for general average, three things must occur:

"1. A common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently 'inevitable', except by voluntary incurring the loss of a portion of the whole to save the remainder.

"2. There must be a voluntary jettison, jactus, or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril, periculi imminentis evitandi causa, or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

"3. This attempt to avoid the imminent common peril must be successful."

In the "Star of Hope" case, 9 Wall. 203, the vessel was stranded for the purpose of saving the cargo and crew, and general average was decreed.

All the elements necessary to constitute a general-average case were present in the instant case. The fire on the transport was admittedly and obviously a common danger to ship and cargo; there was a voluntary sacrifice of a part of the cargo, Ralli v. Troop, 157 U. S. 386; the fire was extinguished and, as a result of the sacrifice, the transport and her cargo arrived safely at her destination. The primary element for general average is that there must be a common danger (fire) which threatens the safety of vessel and cargo. The obligations of general average do not arise from a contract of carriage or obligation to pay freight, but from the very fact that cargo is placed in a vessel and both proceed to sea and a common danger is encountered which is successfully avoided by a sacrifice of the interests of one of them. There is nothing unilateral about the doctrine of general average. It applies to both ship and cargo. In the "Star of Hope" case, supra, the ship was selected for the voluntary sacrifice and the cargo was made to contribute. Had the transport been selected for the sacrifice to save the cargo, the Government, as owner of the ship, could have recovered from the cargo saved its contributory share in the general average. The rule of contribution in general average is clearly set out in "The Roanoke" case, 59 Fed. 161, 163, as follows:

"The rule for contribution in general average is older than, and entirely aside from, the common law; is a rule both of equity and policy, which has come down through the centuries from an old Rhodian law, adopted in the Roman jurisprudence, and thence entered in the general maritime law. It appears to have been preserved in England without enforcement by statute. It applies only to shipping, and prescribes that in all cases of imminent peril to the whole adventure, where release is obtained by intentional sacrifice of any part for the benefit of the residue, contribution shall be made by the saved portions for that which was so sacrificed. The common peril takes from the master of the vessel his paramount obligation to his vessel owners and charges him with a joint agency for the owners of cargo and vessel, to act impartially, decide when a sacrifice is necessary, and select for sacrifice that which will best serve the interest of all to avoid the peril. This general-
24 average contribution is not dependent upon contract, but is 'built upon the plainest principle of justice' (3 Kent Comm. 233), and is aside from contract ('The Eagle', 8 Wall. 23): 'It is the safety of the property, and not of the voyage, which constitutes the true foundation of general average.' Insurance Co. v. Ashby, 13 Pet. 331. *The vessel is made to contribute, as well as the cargo saved, not because of its undertaking to carry, or out of*

any duty as carrier but because it had encountered peril and had been saved to the owners by a sacrifice of other property." (Italics ours.)

The fact that the Government received no freight hire for the cargoes of the respective shippers has no bearing on the question as to the liability of the ship to contribute in general average where a part of the cargo has been sacrificed to save both the ship and cargo. The obligation to contribute does not arise out of the contract of carriage but from participation in the common venture. A clause in a bill of lading providing that goods are carried at owner's risk does not bar contribution in general average. Swift & Co. v. Glasgow Steamshipping Co., 280 Fed. 910. See also Dibrell Bros., Inc., v. Prince Line, Ltd., 58 Fed. (2d) 959.

In an imminent peril to both ship and cargo, a part of the cargo was destroyed by the flooding of the hold of the transport "Logan" and the Government, as owner of the vessel, benefited by this sacrifice in the saving of its vessel and cargo, which otherwise would have been destroyed in whole or part.

The liability of the Government, as owner of the transport, for its contributive share in general average is clear. Repeatedly has the Government been held [illegible] in general-average contribution for goods belonging to the United States shipped on a merchant vessel. Brown v. United States, 15 C. Cls. 392; The Davis, 10 Wall. 15; United States v. Wilder, Fed. Cases, no. 16,694.

In the Workman case, supra, at page 573, the court said: "The prerequisite in admiralty to the right to resort to a libel in personam is the existence of a cause of action, maritime in its nature."

From the time the sacrifice was made and the ship arrived safely at the port of destination there was created a cause of action, maritime in its nature, and a right to a libel in personam, cognizable in a court of admiralty. "By the ancient and settled practice of courts of admiralty, a libel in personam may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libellee, or an attachment made of any personal property or credits of his: * * *" In re the Louisville Underwriters, 134 U. S. 488, 490. There can be no dubiety that the national Government is exempt from process in all courts. It cannot be sued without its consent. The Government has not consented to be sued for an action sounding in tort, but a claim for contribution in general average is based in equity and not tort. "Western Maid," 257 U. S. 419. All the cases from earliest time clearly show that, although there may exist a liability against a public ship for some maritime tort or principle of the admiralty law, nevertheless, there can be no redress because of the sovereign's exemption from suit. "The Siren," 7 Wall. 152; United States v. Wilder, 3 Sumner 308; "The Davis," 10 Wall. 15.

In most, if not all, of the cases the courts expressly state the lack of jurisdiction is entirely due because the Government has not consented to be sued. Workman v. New York City, supra. The

courts had no jurisdiction over the sovereign, no matter how great was the liability. The Government of the United States has consented to be sued on claims in the admiralty law and in 1887 Congress passed an act commonly known as the Tucker Act, 24 Stat. 505, 36 Stat. 1136, and by section 145 this court is given jurisdiction of "all claims founded * * * upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, *or admiralty* if the United States were suable." (Italics ours.)

"A liability of the owners in personam, however, is not dependent upon ability to maintain a proceeding in rem because of a maritime tort." Workman v. New York City, supra.

This is a maritime claim against the United States brought in this court acting as a court of admiralty, and, under the provision of the statute express jurisdiction is conferred. The Government has waived its exemption from suit and has given its consent to have an action in personam brought in this court for the redress of any liability not sounding in tort under the admiralty law. See Matson Navigation Company, 284 U. S. 352.

Having found that the Government is liable for general-average contribution, and that this court has jurisdiction, the only remaining question for decision is the amount which the defendant should contribute.

The defendant asserts the Government is only liable, if liable at all, for the actual amount paid by the underwriters to the insured. The plaintiff claims the full general-average contribution of the amount found due by the Government as owner of the vessel and part of the cargo as found by the adjusters by reason of the fact that the master failed to take bonds from the cargo owners, upon arrival at destination, for their respective shares of the general-average contribution and therefore the defendant, as the owner of the vessel, is responsible for the full contribution of all parties.

In the case of "The Santa Ana," supra, at page 802, the court said:

"It is well settled, however, that if the master fails to exercise the lien which by law he has on the goods of all shippers for their just proportion in the general-average contribution, and delivers the goods without requiring payment of a general-average bond or other security for the payment thereof, he and the shipowner become personally responsible for the full amount of the general-average contribution, which all interests should pay to persons aggrieved."

See also Heye v. North German Lloyd, 33 Fed. 60; Det Forenede Dampskibs Selskab v. Insurance Co. of North America, 28 Fed. (2nd) 449; and The Ernestina, supra.

Under the general-average statement, as prepared and issued by the defendant, as owner of the vessel, the contribution payable
26 by the United States as owner of the hull of the "Logan" was $22,213.88, and as owner of miscellaneous cargo of the

War Department $19,971.81, or a total of $42,185.69. In addition to this amount, the United States is liable for the additional sum of $5,913.71 for the contribution of other parties to the general average, because of the failure of the master to require bonds of the respective cargo owners.

The plaintiff is entitled to recover the sum of $48,099.40. It is so ordered.

Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

Green, Judge, took no part in the decision of this case.

27 VII. *Judgment*

At a Court of Claims held in the city of Washington on the 5th day of November 1934, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is entitled to recover.

It is therefore adjudged and ordered that the plaintiff recover of and from the United States the sum of forty-eight thousand ninety-nine dollars and forty cents ($48,099.40).

VIII. *Proceedings after entry of judgment*

On December 15, 1934, the defendant filed a motion for a new trial, and for argument of same.

On January 2, 1935, the plaintiff filed opposition to said motion.

On January 14, 1935, the court entered the following order on said motion:

ORDER

Motions enumerated below having come before the court, upon consideration thereof it is ordered this 14th day of January 1935 that said motions as follows be, and the same are, overruled:

K–58. Atlantic Mutual Insurance Co. Defendant's motion for new trial and request for oral argument thereon.

* * * * * * *

28 [Clerk's certificate to foregoing transcript omitted in printing.]

(Endorsement on cover:) File No. 39497. Court of Claims. Term no. 869. The United States, petitioner, vs. Atlantic Mutual Insurance Company. Petition for writ of certiorari and exhibit thereto. Filed April 12, 1935. File No. 869 O. T. 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1935

Supreme Court of the United States

Order allowing certiorari

Filed May 20, 1935

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. [redacted] 21

In the Supreme Court of the United States

OCTOBER TERM, 1934

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above case.

OPINION BELOW

The opinion of the Court of Claims is reported in 1934 A. M. C. 1563.

JURISDICTION

The judgment of the Court of Claims was entered November 5, 1934. Motion for a new trial was overruled January 14, 1935. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether general average doctrines apply to the operation of an Army transport carrying military supplies and personnel, and cargoes belonging to the American Red Cross, the Government of the Philippine Islands and its national railway, so as to obligate the United States to contribute in general average.

2. Whether, if the United States is obligated, the cause of action upon which contribution is claimed first accrued upon delivery of the cargo at destination or upon the conclusion of a statement prepared by general average adjusters.

3. Whether an underwriter who has paid the Philippine Government and its national railway for the full physical damage caused to their cargo may recover more than the amount paid to its assured, on the ground that the United States is liable for the contributions of all cargo owners from whom bonds were not required upon release of the respective cargoes.

4. Whether, in computing the general average contribution of the United States, interest should be added to the amounts which the other parties are to receive.

STATUTES INVOLVED

Section 156 of the Judicial Code, as amended (28 U. S. C., Sec. 262):

> 'Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting

> forth a statement thereof is filed in the court * * * within six years after the claim first accrues. * * *

Section 177 of the Judicial Code, as amended (28 U. S. C., Sec. 284):

> No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest * * *.

STATEMENT

The findings of fact by the Court of Claims may be summarized as follows:

The Army transport *Logan*, which was used primarily in the carrying of military supplies and personnel with authorized allowances of baggage, sailed on December 5, 1918, for Vladivostok, Siberia, and the Philippine Islands. In addition to military supplies, personnel, and baggage, the *Logan* carried on this voyage Red Cross supplies and property of the Government of the Philippine Islands and the Manila Railroad Company, all of whose capital stock is owned by the Philippine Government. This property was carried subject to a notice posted on the bulletin board in the quartermaster's station at the dock in San Francisco, from which the *Logan* sailed, that the United States would use due care in handling goods on the transport but would not be responsible for them. The supplies and cargo were carried free of charge and no bills of lading were issued.

During the voyage fire was discovered in one of the holds, and in extinguishing it a substantial portion of cargo was damaged by water and steam, and some of it was thrown overboard. The fire, as was later found, was caused by spontaneous combustion and was due to the negligence of no one. On January 4, 1919, the *Logan* arrived at Vladivostok and discharged part of the cargo; on January 19 the remainder of the cargo was discharged at Manila. The master of the transport delivered the cargo without obtaining from the Philippine Government or its national railway, or from the Red Cross, general average bonds.

In April, 1921, the Atlantic Mutual Insurance Company, which had insured the cargoes of the Government of the Philippine Islands and its national railway, completed payment to its assured of the sum of $38,997.02, the full physical damage sustained by their cargo and the full amount claimed by them. On March 15, 1921, the insurance company made claim upon the War Department for general average contribution. A board of inquiry in the War Department denied the claim, but later the Judge Advocate General reversed the decision and held that general average was properly payable. On August 22, 1922, Johnson and Higgins, average adjusters, were employed by the War Department to prepare a general average statement, which was completed and issued on December 31, 1926. It stated that the Government of the Philippine Islands and its railway

were to contribute $8,909.08 and to receive $38,-132.76, plus interest on the same, $18,875.72, leaving a balance to be received of $48,099.40.

On February 18, 1929, the insurance company brought the present action in the Court of Claims. The Government moved to dismiss on the ground that the action was brought more than six years from the date when the cause of action first accrued. The Court of Claims overruled the motion and held that the insurance company was entitled to recover $48,099.40 from the United States.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to dismiss the petition upon limitation grounds.

2. In holding that general average principles apply to voyages of army transports "used primarily for the carrying of Government supplies and the United States Army personnel, and their authorized allowances of baggage."

3. In holding that the underwriter could recover in excess of the amount paid its assured.

4. In allowing as a proper item of consideration in the adjustment interest on the sums to be received.

REASONS FOR GRANTING THE WRIT

1. The question whether the United States as owner of an Army transport is liable to contribute in general average has not been passed upon by

this Court. In *Johnson & Higgins* v. *United States,* 287 U. S. 459, it was said (p. 462) that "The question of that liability could not be regarded as free from doubt." In that case, which arose out of the same events as the case at bar, the Court of Claims had resolved the doubt in favor of the United States, holding that the Quartermaster Corps had no authority to engage general average adjusters to determine the amount of a contribution for which the United States was not liable. This Court found it unnecessary, as the Solicitor General agreed, to decide the question of the liability of the United States for general average contribution, holding that the adjusters could recover compensation irrespective of the legal liability of the United States to contribute in general average.

In the case at bar the Court of Claims decided in favor of the general average claimant, overruling *sub silientio* its decision in the previous case. In so doing the court appears to have misapplied the rule announced in *The Davis,* 10 Wall. 15, that the United States is liable for general average contribution as owner of a cargo shipped on a commercial vessel. Where the vessel is owned by the United States and is engaged primarily in carrying military supplies and military personnel of the United States, and is also carrying property of an insular possession, the elements of joint commercial venture which underlie the doctrine of general average appear not to exist. Compare *The West-*

ern Maid, 257 U. S. 419, 431–432; *The Fidelity,* 8 Fed. Cas. No. 4758; 1 Magens on Insurance, p. 63.

2. In holding that the suit was seasonably brought, because the cause of action did not accrue until the conclusion of a statement by average adjusters, the decision below is in conflict with that of the Circuit Court of Appeals for the Second Circuit in *Det Forenede Dampskibs Selskab* v. *Insurance Company of North America,* 31 F. (2d) 658. The precise question in that case was the date as of which extraordinary expenses made in foreign currency by a shipowner were to be converted into dollars for the purpose of determining general average contributions. The Circuit Court of Appeals held that the result depended upon the date as of which the cause of action for general average accrued. Judge Learned Hand, speaking for the court, said with reference to the accrual of the cause of action (pp. 659–660):

> the question is whether a liquidation of the contribution by a general average settlement is a condition upon the shipowner's suit. * * *
>
> We hold that suit may be brought upon the implied obligation at the termination of the venture and acceptance of the goods, and that the amount may be liquidated in the action or suit. * * *

Judge Hand relied in part upon the case of *Du-pont de Nemours & Co.* v. *Vance,* 19 How. 162, where a suit was allowed for general average contribution "although there was no pretense of any

preceding settlement" (p. 659). He disapproved the *dicta* in *The Allianca,* 64 Fed. 871, affirmed by the Circuit Court of Appeals for the Second Circuit in 79 Fed. 989, upon which the Court of Claims in the case at bar principally relied.[1]

3. The amount of the liability of the United States, assuming that there is responsibility in general average, appears to have been determined by an erroneous application of general average principles. Judgment was allowed in the amount of $48,099.40. Of this sum $18,875.72 is properly to be regarded as interest upon the sum otherwise due. Congdon on General Average (2d ed.), p. 165. Such allowance of interest is unauthorized in the Court of Claims. *Tillson* v. *United States,* 100 U. S. 43. The sum of $5,913.71 was included in the liability as representing the contribution of the other parties to the general average. This additional liability was imposed upon the United States because of the failure of the master of the transport to require bonds of the respective cargo owners. The application of this principle of general average to the circumstances of the case at bar presupposes that the United States is obliged to exact bonds from the American Red Cross, the Philippine Gov-

[1] The other cases cited by the court below on this question do not deal with the time as of which the right to recover general average contribution accrues. These cases are: *Leggett & Co.* v. *500 Cases of Tomatoes,* 15 F. (2d) 270; *The Emilia S. de Perez,* 22 F. (2d) 585; *The Ernestina,* 259 Fed. 772, and *The Santa Ana,* 154 Fed. 800.

ernment and its national railway upon the surrender to them of their property carried on an Army transport. This assumption is not discussed in the opinion below.

Even if the insured, which made no claim for general average contribution, could have availed itself of the additional contribution because of the master's failure to require bonds, the further question is raised whether the underwriter may recover, in an action in its own name, more than it has paid to its insured.

4. This case presents questions of importance to the United States and underwriters alike, which have not been passed upon by this Court. The decision below is in conflict with a decision of the Circuit Court of Appeals for the Second Circuit. In several respects it rests upon an apparently erroneous application of the principles of general average to a military vessel of the United States engaged in governmental service.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

APRIL 1935.

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No. 21

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

ATLANTIC MUTUAL INSURANCE COMPANY

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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Fairgrieve v. *Marine Insurance Co.*, 94 Fed. 686	24
Fidelity, The, 16 Blatchf. 569, 8 Fed. Cas. No. 4758	16, 19
Finn v. *United States*, 123 U. S. 227	9
Ford v. *United States*, 116 U. S. 213	9

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Cases—Continued.

James P. Donaldson, The, 19 Fed. 264 (aff'd., 21 Fed. 671, certified and determined, 167 U. S. 599) 17, 21
Johnson & Higgins v. *United States*, 74 C. Cls. 331, reversed, 287 U. S. 459 22
Lawrence v. *Minturn*, 17 How. 100 21
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Noreuro Traders, Ltd. v. *E. Hardy & Co.*, 16 Lloyd's List Law Reports, 319 12
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Oquendo, The, 38 Law Times 151; 3 Aspinall's Maritime Cases, 558 12
Ralli v. *Troop*, 157 U. S. 386 ..... 15, 16, 21
Rice v. *United States*, 122 U. S. 611 10
St. Johns, The, 101 Fed. 469 24
Ex parte State of New York, No. 1, 256 U. S. 490 19
Sturgess v. *Cary*, 2 Curtis 59 13
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U. S. C., Title 31, secs. 218–221 20
U. S. C., Title 36, sec. 11 18

Miscellaneous:

Am. & Eng. Enc. of Law (2d Ed.), Vol. 14, p. 999 13
Am. & Eng. Enc. of Law (2d Ed.), Vol. 14, p. 997 22
Barclay on General Average, p. 6 14
Congdon on General Averages (2d Ed.), p. 165 26
Francesco Berlingieri, The York-Antwerp Rules, p. 105 26
Hopkins, *General Average*, p. 55 20
1 Story's Eq. Jur. (13 Ed.), sec. 491 13
1 Magens on Insurance, p. 63 15

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 21

UNITED STATES OF AMERICA, PETITIONER

v

ATLANTIC MUTUAL INSURANCE COMPANY

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 12–20) is reported in 1934 A. M. C. 1563.

JURISDICTION

The judgment of the Court of Claims was entered November 5, 1934 (R. 20). Motion for a new trial was overruled January 14, 1935 (R. 20). A petition for a writ of certiorari was filed April 12, 1935 (R. 20), and was granted May 20, 1935. The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in a suit against the United States for contribution in general average, the cause of action first accrues upon the delivery of the cargo at its destination or upon the conclusion of the statement prepared by general average adjusters.

2. Whether general average doctrines apply to the operation of an Army transport carrying military supplies and personnel, and cargoes belonging to the American Red Cross, the Government of the Philippine Islands and its national railway, so as to obligate the United States to contribute in general average.

3. Whether an underwriter, who has paid the Philippine Government and its national railway for physical damage caused to their cargo, may recover more than the amount paid to its assured.

4. Whether, in computing the general average contribution of the United States, interest should be added to the amount which the other parties are to receive.

STATUTES INVOLVED

Section 156 of the Judicial Code, as amended (28 U. S. C., Sec. 262):

> Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues. * * *

Section 177 of the Judicial Code, as amended (28 U. S. C., Sec. 284):

> No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest * * *.

STATEMENT

The findings of fact by the Court of Claims may be summarized as follows (R. 7–12):

The Army transport *Logan,* which was used primarily in the carrying of military supplies and personnel with authorized allowances of baggage, sailed on December 5, 1918, for Vladivostok, Siberia, and the Philippine Islands (R. 8). In addition to military supplies, personnel, and baggage, the *Logan* on this voyage carried Red Cross supplies and certain property of the Government of the Philippine Islands and of the Manila Railroad Company, all of whose capital stock is owned by the Philippine Islands Government (R. 7, 8). This property was carried subject to a notice posted on the bulletin board in the Quartermaster's Station at the dock in San Francisco, stating that the United States would use due care in handling goods shipped on the transport, but would not be responsible for them (R. 8). The supplies and cargo were carried free of charge, and no bills of lading were issued (R. 8).

During the voyage fire was discovered in one of the holds and in extinguishing it a substantial portion of the cargo was damaged by water and steam, and some of it was thrown overboard (R. 9). The fire, as was later found, was caused by spontaneous combustion, and was due to the negligence of no one (R. 9). On January 4, 1919, the *Logan* arrived at Vladivostok and discharged part of the cargo (R. 9). On January 19, 1919, the *Logan* arrived at Manila, and there discharged the remainder of the cargo (R. 9). The master of the transport delivered the cargo without obtaining from the owners and consignees general average bonds (R. 9). In April 1921 the Atlantic Mutual Insurance Company, the respondent herein, which had insured the cargoes of the Government of the Philippine Islands and its national railway, completed payment to its assured in the sum of $38,997.02, which amount constituted payment in full of all losses claimed by the assured under the policies (R. 9–10). On March 15, 1921, the insurance company made claim upon the War Department for general average contribution (R. 10). A board of inquiry in the War Department denied this claim, but subsequently the Judge Advocate General reversed the decision and held that general average was properly payable (R. 10).

On August 22, 1922, Johnson & Higgins, average adjusters, were employed by the War Department

to prepare a general average statement, which was completed and issued on December 31, 1926 (R. 10–11). This statement showed that the Government of the Philippine Islands and its railway were to contribute $8,909.08, and to receive $38,132.76, plus interest on the same in the amount of $18,-875.72, leaving a balance to be received of $48,099.40 (R. 10–11; pp. 52–57 of statement of the general average adjuster[1]). On or about May 28, 1928, the General Accounting Office notified the respondent that its claim for payment of general average had been rejected (R. 11). On or about December 10, 1928, the Comptroller General, on review, notified the respondent that the disallowance of its claim had been sustained (R. 11). On February 18, 1929, the insurance company brought the present action in the Court of Claims (R. 1). The United States moved to dismiss on the ground that the action was brought more than six years from the date when the cause of action first accrued (R. 6). The Court of Claims overruled that motion, and on the merits held that the respondent was entitled to recover from the United States the sum of $48,-099.40 (R. 20).

[1] This general-average statement is by reference made a part of finding No. 14 (R. 11). The full statement was not printed in the record, but certain relevant portions of it were quoted. Pages 52–57 of the statement, however, were not quoted, and they are therefore printed in the appendix to this brief. The full statement is on file in the office of the Clerk of this Court.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In failing to dismiss the petition upon limitation grounds.

2. In holding that general average principles apply to voyages of Army transports "used primarily for the carrying of Government supplies and the United States Army personnel, and their authorized allowances of baggage."

3. In holding that the underwriter could recover in excess of the amount paid its assured.

4. In allowing, as a proper item of consideration in the adjustment, interest on the sums to be received.

SUMMARY OF ARGUMENT

I

Section 156 of the Judicial Code, as amended, precludes the Court of Claims from entertaining a suit filed more than six years after a claim first accrues. In the instant case the *Logan* arrived at its port of destination in January 1919, the general average statement was issued in December 1926, and the suit was filed in February 1929.

The court below held that the general-average statement was in the nature of an account stated, and that the statute did not commence to run until the issuance of such statement.

A claim first accrues from the time suit may first be brought thereon. A suit for a general-average contribution may be brought from the time the ves-

sel arrives at its port of destination. A general-average statement is not a condition precedent to the institution of a suit. A claimant against the United States has six years from the time a cause of action arises within which to seek settlement of his claim, but he must file suit before the expiration of the six-year period. A general-average statement is not an account stated. The statute of limitations had run at the time the general-average statement was issued. Officers of the Government have no authority to issue an account stated, and revive an action which is barred. The Court of Claims, therefore, in this case, had no jurisdiction to entertain the suit.

II

The United States is not liable for contribution in general average insofar as public vessels are concerned. The case of *Johnson & Higgins* v. *United States,* 287 U. S. 459, expressly left this question open. The absence of any authority holding that military or other public vessels are subject to general average rules would deny that they were. An Army transport is part of the sovereignty to which she belongs and her liability is merged in that of her sovereign. Characteristic principles and rules of maritime law cannot impose themselves upon and override the privileges and prerogatives which belong to the sovereign. Equitable principles would deny the application of the rule of gen-

eral average to this case. In order that there exist liability in general average the voyage must constitute a common adventure. The voyage here in question was part of a military operation and should not be classed as a common maritime venture.

III

The respondent is in court under the theory of subrogation. The contracts of insurance were contracts of indemnity. Under the doctrine of subrogation a subrogee is entitled only to reimbursement of the amount actually paid by him. It was, therefore, error on the part of the Court of Claims to render judgment in excess of the amount actually paid by the respondent.

IV

The rule that the United States is not liable for interest, except where it assumes such liability by contract, by express words of a statute, or where it must pay it as part of just compensation required by the Constitution, is too well settled to admit of doubt. The judgment of the court below includes the sum of $18,875.72, which represents interest for which the United States has not assumed liability, and accordingly, its inclusion in the judgment was error on the part of the court below.

ARGUMENT

I

THE COURT BELOW LACKED JURISDICTION OF THE INSTANT CASE BECAUSE THE CLAIM FIRST ACCRUED MORE THAN SIX YEARS PRIOR TO THE INSTITUTION OF THE SUIT

Section 156 of the Judicial Code, as amended, *supra,* p. 2, provides that every claim against the United States cognizable by the Court of Claims shall be forever barred, unless a petition setting forth such claim is filed in the court within six years after the claim first accrues. This statute is not only one of limitation, but it is also a jurisdictional statute, the Court of Claims being without jurisdiction to entertain any suit filed more than six years after the claim first accrues. *Ford* v. *United States,* 116 U. S. 213, 217; *Finn* v. *United States,* 123 U. S. 227, 232–233; *United States* v. *Wardwell,* 172 U. S. 48, 52.

In the instant case, the loss occurred in December 1918, and the *Logan* arrived at Manila, its port of destination, on January 19, 1919. The respondent, after having satisfied the claim of the insured, filed on March 15, 1921, a claim with the War Department for a general-average contribution. The War Department referred the matter to Johnson & Higgins, a firm of general-average adjusters, who, on December 31, 1926, issued the general-average statement. The suit in question was filed in the Court of Claims on February 18, 1929.

In the court below the Government urged that the claim should be dismissed because the cause of action accrued during January 1919, when the *Logan* arrived at destination and delivered her cargo, and the petition was not filed until ten years later. The court, however, held that although a libel *in rem* could have been filed by the cargo owners against the ship (if privately owned) upon arrival at destination, a different rule applied *in personam*. It considered the general average statement prepared by the adjusters to be in the nature of an account stated and that the right of action accrued at the time of its submission.

A claim first accrues at the time suit first may be brought. (*Rice* v. *United States,* 122 U. S. 611, 617; *Louisville Cement Co.* v. *Interstate Commerce Commission Co.,* 246 U. S. 638, 644; *Southern Pacific Company* v. *United States,* 67 C. Cls. 414, 422.)

We respectfully submit the sound rule is stated in *Det Forenede Dampskibs Selskab* v. *Insurance Company of North America,* 31 F. (2d) 658 (C. C. A. 2d), certiorari denied, 280 U. S. 571, where it was held that a suit for general average contribution, in the absence of the claim being rested on a general average bond containing conditions to the contrary, may first be brought at the termination of the voyage and with the delivery of the cargo. Judge Learned Hand, speaking for the court, said (pp. 659–660):

> We hold that suit may be brought upon the implied obligation at the termination of

> the venture and acceptance of the goods, and that the amount may be liquidated in the action or suit. The law is familiar enough in actions of tort and in many actions in contract, with liabilities which are presently due, although unliquidated. With the consistency of the motion we are not concerned; it is enough that the obligor is treated as though presently liable. An average bond may, of course, change this, and make the settlement a condition precedent upon the right of action. Such was apparently the case in *Wavetree S. S. Co.* v. *Love* (1897), L. R. App. Cas. 373, though even then it was held that the shipowner might state the adjustment himself. Nor, indeed, was it decided even in the case of such a bond that no action could be brought as upon an unliquidated claim. However that may be, the record does not advise us of the language used in this bond; we are to take it as a substitute for the consignee's implied obligation. We need only say that, unless the contrary appears, the obligation becomes unconditionally due upon acceptance of the goods.

The court below did not consider that case "as either controlling or actually bearing on the question" of limitation, and the ruling, at most, "merely *obiter*" (R. 15). We cannot agree with this. While the rate of exchange to be applied to general average contribution was the question involved there, that question depended upon the due

date of the contribution, and the court held that that date was when the ship arrived at the port of destination, at which time the cause of action first accrued and the right to bring suit arose, rather than later when the adjustment was concluded. This ruling is in conformity with the English decisions. *Noreuro Traders, Ltd.* v. *E. Hardy & Co.*, 16 Lloyds List Law Reports 319, and *The Oquendo*, 38 Law Times 151; 3 *Aspinall's Maritime Cases*, 558.

The Allianca, 64 Fed. 871 (affirmed, 79 Fed. 989), an earlier case in the same circuit holding to the contrary, upon which the court below rested its decision, was expressly overruled in the *Det Forende* case, *supra*, upon the authority of *Dupont de Nemours & Co.* v. *Vance*, 19 How. 162. This Court in the latter case treated a libel *in rem* for non-delivery of cargo as a general average action, and remanded the case to state the adjustment. See *The Eugenia J. Diacakis*, 22 F. (2d) 461. The opinion of the court below (R. 14) recognizes the soundness of this rule as applied to proceedings by cargo owners against the ship, but concluded a different rule was to be applied where the proceedings were against the owner. We see no soundness in such a distinction.

It seems that courts of equity also have jurisdiction of general-average causes from the very nature of the subject, the obligations being imposed by law on the principles of equity and justice. In such

proceedings a court of equity has authority to bring all the parties before it and refer the whole matter to a master to state the apportionment or adjustment. 1 Story's Eq. Jur. (13 Ed.), sec. 491; *Sturgess* v. *Cary*, 2 Curtis 59; Am. & Eng. Enc. of Law (2d Ed.), Vol. 14, p. 999. The Court of Claims is given jurisdiction over claims upon a contract express or implied "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." U. S. C., Title 28, sec. 250. The respondent could have sought such relief in the Court of Claims upon the delivery of the cargo. Cf. *District of Columbia* v. *Barnes*, 197 U. S. 146; *Cramp* v. *United States*, 239 U. S. 221. Although the cargo was delivered January 1919 the underwriter here did not file its suit in the court below until February 18, 1929 (R. 1).

The law applying to limitation of actions, we think, is correctly stated by the court below in *Cohen Goldman & Co.* v. *United States*, 77 C. Cl. 713, 730 (certiorari denied, 290 U. S. 681), where it was held that the statute gave the claimant six years within which to obtain a settlement of its claim in the Departments, but made it necessary that if such settlement should not be effected within that time suit must be instituted within the six-year period. The theory of an account stated which the court below considered is unsound, and ought not

to limit the application of the statute. A general-average statement is not an account stated, but merely the statement of an account. *The Nesco,* 47 F. (2d) 643 (S. D. N. Y.). Furthermore, we submit, there is no authority existing in an executive officer of the Government to issue an account stated after the statute of limitations has barred a cause of action, and thereby revive that cause of action which Congress has expressly stated shall be barred. Still less can we conceive of a general average adjuster, who is in no sense an officer of the Government, issuing an account stated which would revive an action after it has been barred by the statute of limitations.

The petition should be dismissed upon limitation grounds.

II

GENERAL-AVERAGE DOCTRINES DO NOT APPLY TO A PUBLIC VESSEL OF THE UNITED STATES

As applied to commercial ships and cargoes, the principles of general average which the opinion announces are sound. To consider these historically can serve no substantial purpose. All agree that the doctrine of general average contribution was derived from the laws of the Rhodians (about 900 B. C.), then adopted into the Roman law and forms a part of the Digest of Justinian. It has been carried into all the maritime codes, and now is accepted by all nations. Barclay on *General Average,* p. 6; *Ralli* v. *Troop,* 157 U. S. 386.

Broadly speaking, the rule is when a common maritime venture is confronted with a common imminent peril and a voluntary sacrifice or extraordinary expense is made or incurred and there is a resulting benefit to all interests, all shall contribute to indemnify for the loss of the property which is sacrificed by one in order that the whole adventure may be saved. *Aktieselskabet Cuzco* v. *The Sucarseco,* 294 U. S. 394, 401; *Ralli* v. *Troop, supra,* 395–396.

Throughout its entire history it has applied to vessels operated commercially. An exhaustive search of the authorities has been made, and we are unable to find any instances where it has been applied to the voyages of vessels owned by any nation and employed in its public service—operations of Government—save the statement in Magens on Insurance (1755), p. 63:

> There is a Difference nevertheless when these rich Wares come by King's Ships, or Packet Boats, as such Vessels never pay nor receive any Average; see *Case,* 10 E. The Reason is, in Goods belonging to his Majesty all his Subjects in general are concerned, wherefore for any particular Loss of them no particular Contribution is necessary, because it is supplied by the general Contribution of the whole Community.

There are cases where general average contribution has been assessed against government-owned property carried aboard commercial vessels,

United States v. *Wilder,* Fed. Cas. No. 16694; *Brown* v. *United States,* 15 C. Cls. 392, but no question of public use was involved there. The distinction between public use and government ownership is pointed out in *The Fidelity,* 16 Blatchf. 569, 8 Fed. Cas. No. 4758, where the court said:

> No question of public use was involved. There was nothing to take it out of the general rules of the maritime law, except public ownership, and that, all will concede, is not enough. Property does not necessarily become a part of the sovereignty because it is owned by the sovereign. To make it so, it must be devoted to the public use, and must be employed in carrying on the operations of the government. There may be some expressions of the learned justices who wrote the opinions in these cases [Siren—the Davis] which, if separated from the facts then under consideration, would indicate that the lien extended to public vessels employed in the public service, as well as to others; but that question was not up for determination, and it is proper, therefore, to confine the actual decision to the cases as they stand.

The absence of any direct authority holding that military or other public vessels are subject to general average rules would deny that they were. This Court, in *Ralli* v. *Troop, supra,* 414–415, said:

> Considering how ancient and universal is the law of general average, how frequent the occasions for invoking it under every variety

> of circumstances, and how diverse the opinions which have been expressed in regard to its application and extent, it is significant that the learned arguments of counsel, supplemented by further researches, have disclosed no commercial code, no opinion of a commentator, and no judicial decision, supporting a claim to contribution in general average for the destruction of ship or cargo by the municipal authorities of a port, without the direction of the master or other commanding officer of the ship. That being so, it is difficult to see how the parties to a maritime adventure can be considered either to have contracted to contribute to such a loss, or to be subjected by the law, without their consent, to the duty of so contributing.

In that case the services of a fire department, acting only under command of municipal officers, were by authority of municipal law. Judge Addison Brown, in *The James P. Donaldson,* 19 Fed. 264, 269 (aff. 21 F. 671, certified and determined, 167 U. S. 599), applied like reasoning to a tug and tow situation:

> I know of no case in which it has even been discussed. Indeed, the very fact that no claim of this description has ever been made is worthy of suggestion as indicating the view generally taken by the profession. It is true there are in this case many of the elements which go to entitle the barges to a general average contribution, as stated in the leading case of *Bernard* v. *Adams,* 10 How.

> 270; still I know of no case wherein the principle of mutual contribution has been extended beyond the ship, her boats, tackle, apparel, furniture, and cargo. I understand the law of general average to be an outgrowth of the law-maritime as applied to the carriage of goods by sea. * * *

The respondent (underwriter) issued its policy of insurance against marine perils, including loss by fire, covering the carriage by the transport *Logan* (R. 8, 9), and is to be charged with knowledge of the vessel's public status. The general average claim was not presented until two years after the cargo was delivered (R. 10).

The question here presented is whether these accepted principles of general average heretofore applied solely to vessels employed in commercial service, are applicable and overrule the prerogatives of sovereignty which, we submit, here furnish the proper rule. The Government admittedly had committed the Army transport to carry on its military operations during a war period and the venture is to be considered a governmental (military) one only. The Red Cross supplies carried were in aid of war stricken areas, and have a distinctly public status. In *The Western Maid,* 257 U. S. 419, this Court so considered food supplies intended for the war stricken European countries. Transportation of such supplies at the cost of the Government is provided by statute (U. S. C., Title 36, sec. 11). No lien rights of contribution could

be asserted against such cargoes. The property of the Philippine Government and its nationally owned railroad should be so classed. These are supplies purchased by the Bureau of Insular Affairs of the War Department who handle such purchases for our possessions, and the carriage of these supplies cannot limit the military status of the transport.

The question is not a procedural one, as the court below has considered it. The characteristic principles and rules of the maritime law cannot impose themselves upon and override the privileges and prerogatives which belong to the sovereign. *Ex parte State of New York, No. 1,* 256 U. S. 490, 502–503; *The Western Maid, supra,* at p. 432. An Army transport is part of the sovereignty to which she belongs and her liability is merged in that of her sovereign. *The Western Maid, supra; The Fidelity, supra.* No lien liability for average contribution can arise or attach.

In sharp contrast the status of commercial vessels and their cargoes is readily defined. Their primary employment is in trade or commerce, and lien liability (*in rem* proceedings) for average contribution may be asserted against the vessel. *Dupont de Nemours & Co.* v. *Vance, supra,* pp. 168–171. Personal liability of the owner usually is rested upon the consideration that the ship is responsible to make such contribution.

See the most serious situations the rulings of the court below create. A government transport com-

missioned on military service during a war period, carrying military supplies and personnel, because it consents to carry Red Cross supplies intended for relief in war-stricken countries (public property) and supplies for the Philippine Government and its national railroad, both public institutions, now is held subject to general average principles. The master of the Army transport is required to secure average bonds or deposits, upon the theory that such property is subject to a lien for its contribution. No lien liability could be imposed against such property having such public status. The regulations for the Army Transport Service, which in detail outline the duties of the master, contained no such provisions. The general average statement awards contributions to army officers, although their property was aboard upon the command of superiors and in compliance with military requirements, with the law providing reimbursement to them for their losses (U. S. C., Title 31, Secs. 218–221). If general average rests upon equity, as is an accepted theory, equitable principles would deny its application here.

Even in commercial undertakings, general average doctrines have not been applied in every instance where a vessel goes to sea with cargo aboard and a sacrifice in the nature of general average takes place. For example, the rule is stated by Hopkins on General Average (p. 55), to be that if a merchant ship be captured by a public enemy, it is not allowed, "*for national considerations,*" to ransom

her, and consequently a sum of money paid for the ransom of the whole co-adventure could not be recovered from the several interests in general average. However, the same considerations do not apply where the ship is captured by a pirate or private marauder and money is given to the captor through compulsion to effect the release of the vessel and her cargo, and contribution from the other interests may be had. In the *James P. Donaldson* case, *supra,* a tug, in imminent peril of being blown ashore and lost, was saved by casting off and abandoning her tow of barges which were thereafter driven ashore and wrecked. There, one interest was sacrificed for another with which it was closely associated on a sea voyage, but this Court, considering the relation between tug and tow, held that the tug was not liable in general average. In *Lawrence* v. *Minturn,* 17 How. 100, this Court denied a claim in general average against a vessel which had jettisoned her deck cargo. In *Ralli* v. *Troop, supra,* this Court held that the scuttling of a ship by port municipal authorities, acting without the direction of her master or other commanding officer, to extinguish a fire in her hold, was not a general average loss. It was there pointed out that the sole office and paramount duty of the municipal authorities were to protect and preserve all the shipping and property in the port for the benefit of the public and not to benefit private individuals engaged in the venture, and in the execution of this office and in the performance of this duty the municipal

authorities there acted under their official responsibility to the public and not under the direction of the master of the vessel. It is competent for the parties to make any contract they wish which may enlarge, limit, or exempt their liabilities in general average contribution. *Am. & Eng. Enc. of Law* (2d ed.), Vol. 14, p. 997; *The Enrique,* 7 Fed. 490.

The public status here of the parties concerned and the property involved upon like considerations is the factor which makes inapplicable general-average principles.

The operation of military transports is by the paramount authority of Government in the performance of its public obligation. The incidental carriage of cargo for its public institutions and territorial possessions, without pay and subject to notice that it would not be responsible therefor, ought not to qualify such operation. If it be a military operation, we submit the voyage should not be classed as a common maritime venture, which is the basis upon which general average must be rested. The court below reached that conclusion in *Johnson & Higgins* v. *United States,* 74 C. Cls. 331 (reversed on other grounds, 287 U. S. 459).

III

A SUBROGEE IS NOT ENTITLED TO RECOVER A SUM IN EXCESS OF THAT WHICH HE HAS PAID HIS SUBROGOR

Although the underwriter, who here brought the suit, paid its assured, the Philippine Government and its national railway, only $38,996.22, the total

claimed by the assured for damage to their cargo, the court below gave judgment for $48,099.40, the amount of the contributions (including interest) which the adjusters held the assured entitled to receive. These totals include amounts to be contributed by the Red Cross and the Government.

We have difficulty in understanding the ruling of the court below (R. 19). Apparently it rested upon the view that as the master failed to secure average bonds or other security from the Red Cross and the Philippine Government, the United States was responsible for the full amount of contribution as shown in the statement. Irrespective of the questions whether such security could have been required of the Red Cross or whether interest is an item recoverable, the law does deny recovery to an underwriter in any action which it has instituted in its own name, of any sum in excess of that which it has paid to its assured. Subrogation gives indemnity only and cannot take place beyond the amount the underwriter actually has paid. The question of the amount which the assured could have recovered, if they had brought the suit, is not here present.

The applicable rule has been stated by this Court in *Liverpool Steam Company* v. *Phenix Insurance Company*, 129 U. S. 397, 462:

> From the very nature of the contract of insurance as a contract of indemnity, the insurer, upon paying to the assured the amount of a loss, total or partial, of the

> goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount to the assured's right of action against the carrier or other person responsible for the loss; and in a court of admiralty may assert in his own name that right of the shipper.

It consistently has been applied in all the later cases. *Fairgrieve* v. *Marine Ins. Co.,* 94 Fed. 686, 688 (C. C. A. 8th); *The St. Johns,* 101 Fed. 469, 474, 475 (S. D. N. Y.); *Norwich Union Fire Insurance Soc.* v. *Standard Oil Co.,* 59 Fed. 984, 987 (C. C. A. 8th); *The Livingstone,* 130 Fed. 746, 749 (C. C. A. 2d). The opinion of the court below (R. 19, 20) does not consider the application of this principle.

To us there can be no doubt but that the underwriter's recovery, if it be entitled to any, must be limited to the amount it has paid its assured.

IV

THE JUDGMENT OF THE COURT BELOW ERRONEOUSLY INCLUDED INTEREST COMPUTED TO BE DUE FROM THE UNITED STATES BY THE GENERAL-AVERAGE ADJUSTERS

The judgment of the court below included interest computed to be due in the general average statement. The statement, which is made a part of the record by reference (R. 11), shows at pp. 52–53 thereof, *infra,* p. 27, that the Government of the Philippines and its national railroad were to con-

tribute $8,909.08 and were to receive $38,132.76 as allowances and an additional $18,875.72 characterized as "interest on same", making a total balance to be received of $48,099.40. Without interest, the balance would be $29,223.68.

The statute under which the Court of Claims is organized expressly declares that "no interest shall be allowed on any claim up to the time of rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." (U. S. C., Title 28, sec. 284, *supra*, p. 3.) In *Tillson* v. *United States*, 100 U. S. 43, this Court summarized the application of this statute:

> Interest, however, would have been recoverable as against a citizen, if the payments were unreasonably delayed. But with the government the rule is different for, in addition to the practice which has long prevailed in the departments of not allowing interest on claims presented, except it is in some way specially provided for, the statute under which the Court of Claims is organized expressly declares "that no interest shall be allowed on any claim up to the time of the rendition of judgment thereon in the Court of Claims, unless upon a contract expressly stipulating for interest." Rev. Stat. 1091. This is conclusive. No interest was stipulated for in this contract, and the prohibition against its allowance has not been removed in favor of the claimants.

In the average statement, the allowance of the $18,875.72 is designated as "interest on" amount to

be received. Such allowances are characterized as interest in the text books and by the accepted rules of average adjusters. Francesco Berlingieri on The York-Antwerp Rules, p. 105; Congdon on General Averages (2d ed.), p. 165.

The United States here has not assumed the liability to pay interest by contract or by statute. It is an ordinary situation. It would seem to follow that the allowance of $18,875.72, being an item of interest, was erroneous and the judgment, in any view, ought not to exceed $29,223.68.

CONCLUSION

We respectfully submit that the judgment of the Court of Claims should be reversed and the case remanded with instructions to dismiss the petition. If, however, the question of interest or the amount to be contributed needs to be determined, then remanding with instructions for further proceedings would appear proper.

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SEPTEMBER 1935.

APPENDIX

Excerpts from statement of general average (pages 52–57)

Apportionment of general average on cargo and settlement	Contributory value including amount made good	Pays proportion of general average	Receives—		Balance to—	
			Allowances	Interest on same	Pay	Receive
Shipped by various departments of the War Department: Miscellaneous cargo, as per ship's manifest	$669,068	$669,068	$31,289.68	$7,570.48	$3,747.39	$19,971.81
Shipped by the American Red Cross: Miscellaneous cargo, as per ships manifest	260,331	260,331	12,174.66			12,174.66
Shipped to the Philippine Islands Government and the Manila Railroad Company: Miscellaneous cargo, as per ship's manifest	190,503	190,503	8,909.08	38,132.76	18,875.72	$48,099.40
Shipped by Colonel S. E. Allen, Coast Artillery Corps: Personal property, as per ship's manifest	1,851	1,851	86.56	1,013.92	501.89	1,429.25
Shipped by Knute A. Johnston, warrant officer, Coast Artillery Corps: Personal property, as per affidavit	445	445	20.81	445.20	220.37	644.76
	1,122,198	52,480.79	47,162.36	23,345.37		
Owners of vessel: Pay vessel's proportion of general average			*Dr.* 22,213.88		22,213.88	
Average adjusters: Receive their fee and disbursements				*Cr.* 2,365.12		2,365.12
Settling agents: Receive commission for collecting and settling the general average				1,821.82		1,821.82
					54,360.35	54,360.35

U. S. GOVERNMENT PRINTING OFFICE: 1935

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 869.

UNITED STATES OF AMERICA,

Petitioner,

vs.

ATLANTIC MUTUAL INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

J. M. RICHARDSON LYETH,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

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IN THE

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ATLANTIC MUTUAL INSURANCE COMPANY,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Statement.

The general average loss occurred on the Army Transport "Logan" in December, 1918, on a voyage from San Francisco to Manila (p. 3). The Judge Advocate General ruled that general average was properly payable, and the War Department agreed with this decision and wrote on May 6, 1920, that it would bear its share of any general average adjustment (p. 5). The War Department thereupon employed Johnson & Higgins, well known average adjusters, to prepare a general average statement, which was not completed and issued until December, 1926, (p. 3). The amount payable to the respondent as shown by the general average statement was approved by the War Department, and vouchers were prepared and sent to the General Accounting Office for

approval; but in May, 1928, Comptroller General McCarl denied all liability on the ground that "the vessel and all cargo aboard were property of the United States. Therefore, the claimants, as insurers of the cargo consigned to the Philippine Islands Government and the Manila Railroad, are not entitled to contribution in general average, which would be equivalent to the United States paying for the loss of property on which it had carried insurance against such loss" (pp. 5-6).

The owners of the cargo on board the "Logan" were, in addition to the War Department, the American Red Cross, the Philippine Islands Government, the Manila Railroad Company, (a stock corporation incorporated in the State of Maine) and two Army officers. It is thus apparent that not only was the Comptroller General obviously in error in the facts upon which he predicated his denial of the claim, but he also confused the separate legal entities above named.

This suit was instituted in the Court of Claims promptly after the denial of the claim by the Comptroller General. He refused even to permit the Attorney General to stipulate facts which were not in dispute, and put the respondent to great expense and labor in taking testimony in San Francisco, New York and in England.

The general average sacrifice occurred while the Army Transport "Logan" was carrying miscellaneous merchandise and supplies for the Manila Railroad Company, Philippine Islands Government and the American Red Cross from San Francisco to Manila in the month of December, 1918. As a result of the war emergency, merchant ships regularly operating in the Pacific trade were transferred to the Atlantic Ocean and Army transports were carrying

all sorts of miscellaneous supplies to the Philippines. The supplies shipped on this voyage consisted of miscellaneous office stationery, equipment, books, etc. (pp. 7 and 8).

Argument.

1. This case arose out of unusual circumstances which are not likely to be repeated. The Army transports, owing to the war emergency, were actually carrying freight for parties other than the War Department or the Government of the United States. The situation is so far out of the ordinary that it does not present questions of general public interest.

2. There can be no serious question that the United States, as owner of an Army transport, is liable to contribute in general average where it is transporting freight for other parties. It is well settled that Government property contributes in general average. *The Davis,* 10 Wall. 15; *United States* v. *Wilder,* 28 Fed. Cases No. 16,694; *Brown* v. *United States,* 15 Ct. of Claims 392; Arnould Marine Insurance 11th Ed. Vol. II., Sec. 973; Phillips Insurance, Vol. II., Sec. 1345.

The transport was in fact substituting for the regular commercial carriers on the Pacific and was carrying non-military goods for a number of shippers. The fact that no freight was paid or payable does not affect the obligations in general average. The fact that freight was not payable was the basis of the holding of the Court of Claims that there was no general average in the previous case brought by Johnson & Higgins for their fee in preparing the general average statement. That argument has not been urged by the Government in this case, and the Court of Claims reversed its former decision.

If the general average sacrifice had happened to fall on the hull of the "Logan" instead of on her cargo, there would have been no question but that the cargo should contribute in general average. Obligations in general average obviously are mutual.

3. There is no conflict between the decision of the Court of Claims in this case and the decision of the Circuit Court of Appeals for the Second Circuit in *Det Forenede Dampskibs Selskab* v. *Insurance Company of North America,* 31 Fed. (2d) 658. That case was not concerned with the statute of limitations or with laches, its equivalent in Admiralty. The sole question was the date which should govern the rate of exchange for converting Danish kroner into dollars. In fact, in his opinion, Judge Learned Hand expressly distinguished the earlier case of *The Allianca,* 64 Fed. 871, affd., 79 Fed. 989, on the ground that the latter case involved a question of laches. Judge Hand's opinion is chiefly concerned with the question whether a cause of action could have been maintained by the vessel owner against the cargo for general average contribution prior to the time when the general average statement was prepared, and he held that delivery of the goods to the consignee implied an agreement on the part of the consignee to pay the general average contribution.

The present case is a suit by the cargo owner against the vessel owner, and the situation is entirely different in that no further act remains to be done by the cargo owner after the merchandise is delivered to him before the payment of general average contribution; whereas the vessel owner is charged with substantial duties to be performed as follows:

(a) The vessel owner must obtain a deposit of cash or sufficient security to cover possible contribu-

tions in general average owing by the respective shipments of cargo before delivering them.

(b) The owner must prepare, or cause to be prepared, a general average statement.

(c) The vessel owner must either himself, or through his agent the average adjuster, collect the net amounts payable by the debtor interests in general average and disburse such collections to the creditor interests.

Judge Addison Brown held in *The Allianca, supra,* which was affirmed by the Circuit Court of Appeals for the 2d Circuit, that laches did not begin to run in an action by the cargo owner against the vessel owner until the general average statement had been issued.

In view of the fact that Judge Hand expressly distinguished *The Allianca,* the latter case must be regarded as the law of the Second Circuit, and it is in entire harmony with the decision of the Court of Claims below.

The situation respecting the statute of limitations is analogous to cases in anticipatory breach of contract, where the injured party may either bring suit immediately upon the first breach (*i. e.,* upon arrival of the goods at destination in case of general average), or may treat the contract as continuing and wait until the time has elapsed for complete performance (*i. e.,* until the issuance of the general average statement prepared by the vessel owner). *Foss-Schneider Brewing Co.* v. *Bullock,* 59 Fed. 83 (CCA 6—1893); *Cleveland Rolling Mill* v. *Rhodes,* 121 U. S. 255; *Roehm* v. *Horst,* 178 U. S. 1. Likewise, where there are successive acts to be performed under a contract, the statute of limitations does not commence to run until the date of the last breach. *Wold* v. *Wold,*

138 Minn. 409; *Heery* v. *Read*, 80 Kas. 380; *Harris* v. *Townsend*, 101 Miss. 590.

4. The Government complains that the amount of its liability was erroneously computed because it included interest and a portion of the amount of general average owing from owners of cargo which the master had failed to collect or to secure. The judgment was only for the amount of general average shown to be due to the respondent in the statement prepared by Johnson & Higgins, the average adjusters employed and paid by the Government itself; no interest was added to this amount. It is also settled beyond question that the vessel owner must make good general average contributions due from cargo which the master delivered without taking proper deposit or security. *The Santa Ana*, 154 Fed. 800; *Heye* v. *North German Lloyd*, 33 Fed. 60; *The Ernestina*, 259 Fed. 772; *Carver, Carriage of Goods by Sea*, Sec. 442.

The Government also raises the question whether an underwriter may recover more than it has paid to its insured. The respondent's claim arises by subrogation and it is fundamental that the underwriter may enforce the claim of its assured; and it is no defense to a third party that the recovery may exceed the amount paid by the underwriter to the assured. *Mobile & Montgomery Ry. Co.* v. *Jurey*, 111 U. S. 584; *The Propeller Monticello* v. *Mollison*, 17 How. 152; *City of Bangor*, 60 Fed. (2nd) 90.

The decision below is not in conflict with the decision of the Circuit Court of Appeals, 2d Circuit, in *Det Forenede Dampskibs Selskab* v. *Insurance Company of North America, supra*, but is in harmony with the law of that Circuit and with the general

body of the law. The entire litigation has been rendered necessary at great expense, labor and delay to the respondent solely because of a ruling by the Comptroller General which was based on erroneous facts and upon a palpably erroneous view of the rules of law applicable. The case arose out of an unusual situation which is not likely to be repeated, and is without general significance.

WHEREFORE it is respectfully submitted that this petition should be denied.

J. M. RICHARDSON LYETH,
Counsel for Respondent.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 21

UNITED STATES OF AMERICA,

Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT ATLANTIC MUTUAL INSURANCE COMPANY.

J. M. RICHARDSON LYETH,
Attorney for Respondent.

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IN THE

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OCTOBER TERM, 1935.

UNITED STATES OF AMERICA,

Petitioner,

vs.

ATLANTIC MUTUAL INSURANCE COMPANY,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR THE RESPONDENT.

Opinion Below.

The opinion of the Court of Claims (R. 12-20) is reported in 1934 A. M. C. 1563.

Jurisdiction.

The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

Statute Involved.

Act of March 3, 1911, Chap. 231, Sec. 156 (Section 156 of the Judicial Code) 36 Stat. 1139:

> "Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the Court * * * within six years after the claim first accrues" * * *.

Statement.

This case comes up on writ of certiorari to the Court of Claims to review a judgment in favor of the respondent for $48,099.40 entered November 5, 1934.

The transport *Logan*, owned by the United States and operated by the War Department, sailed from San Francisco on December 5, 1918, bound for Vladivostok and the Philippine Islands (R. 8). In addition to United States Government supplies, she had on board shipments of miscellaneous supplies (principally stationery, books and medical supplies) owned by the American Red Cross, the Government of the Philippine Islands and Manila Railroad Company (R. 8, 9).

The carriage of these shipments for the Red Cross, the Government of the Philippine Islands and the Manila Railroad Company was arranged as a result of the war emergency, which had necessitated the transfer of ships regularly operating in the commercial service in the Pacific to the Atlantic (R. 8).

The shipments owned by the Government of the Philippine Islands and the Manila Railroad Company were insured by the respondent against marine risks, including fire, and are involved in this case (R. 8). No bill of lading was issued covering either of these shipments, nor was any freight paid or agreed to be paid (R. 8).

On the 16th of December, 1918, while the vessel was in the Pacific Ocean some seven hundred miles northwest of Hawaii, fire broke out in No. 1 lower hold. The Captain ordered that water and steam should be pumped into the hold in order to extinguish the fire and prevent the total loss of the vessel and her cargo. Fire broke out again on December 22, 1918, while the vessel was still at sea, and more water was poured into the hold. The fires were thereby

extinguished, but the water badly damaged the shipments belonging to the Government of the Philippine Islands and the Manila Railroad Company (R. 9).

The *Logan* arrived at Vladivostok January 14, 1919, and there discharged part of her cargo. She arrived at Manila January 19, 1919, where the remainder of her cargo was discharged. At both ports, the master permitted the cargo to be unloaded and delivered to owners and consignees without requiring and obtaining from them any bond or bonds to secure payment on general average (R. 9).

Prior to the sailing of the transport *Logan* from San Francisco, respondent had written insurance against marine risks, including fire, upon the shipments owned by the Government of the Philippine Islands and by the Manila Railroad Company. After the arrival of the transport at Manila, the claims were presented by the assured and respondent paid the losses in full in the total amount of $38,997.02 (R. 10).

On May 6, 1920, the Chief of the Transport Service of the War Department wrote to the Chief of the Bureau of Insular Affairs that the War Department would bear its share of any general average payable to cargo on the transport *Logan* (R. 10). On March 15, 1921, respondent presented to the petitioner claim and demand for payment of the general average contribution owing to cargo insured by respondent. Hearings were held by a board of inquiry of the War Department, which denied the claim. The claim was thereafter reviewed by the Judge Advocate General, who reversed the decision of the board of inquiry and held that general average was properly payable to the respondent (R. 10).

In August, 1922, the War Department employed Johnson & Higgins of California, average adjusters,

to prepare a general average statement covering all general average contributions to be paid or received in connection with the aforesaid average on the transport *Logan*. Johnson & Higgins of California undertook the preparation of a general average statement and completed and issued it on or about December 31, 1926 (R. 10, 11).

The general average statement stated the contributory values of the various interests involved on the voyage as follows (R. 11):

Hull:	
The contributory value of said vessel in sound condition was stated to be	$475,000.
Cargo:	
Cargo shipped by the War Department of the defendant	669,068.
Cargo of the American Red Cross	260,331.
Cargo of the Philippine Islands government and the Manila Railroad Company	190,503.
Personal property of Colonel S. E. Allen	1,851.
Personal property of Knute A. Johnston	445.

The general average statement also showed that net contributions were to be paid as follows:

By the War Department for miscellaneous cargo owned by it	$19,971.81
By the American Red Cross for miscellaneous cargo	12,174.66
By the defendant as owner of the hull of the transport *Logan*	22,213.88
Total	$54,360.35

The general average statement also showed that net contributions were to be received as follows:

For miscellaneous cargo owned by the government of the Philippine Islands and the Manila Railroad Company (for which sums the respondent herein is suing in this suit)	$48,099.40
Colonel S. E. Allen, for personal property	1,429.25
Knute A. Johnston, for personal property	644.76
To Johnson & Higgins for fee and disbursements in preparing statement	2,365.12
To ditto for commissions as collecting and settling agents	1,821.82
Total	$54,360.35

On May 28, 1928, the General Accounting Office notified respondent that its claim for allowance and payment of general average had been rejected. The respondent made application to the General Accounting Office for a review of the disallowance of the claim, and on December 10, 1928, the Comptroller General of the United States notified respondent that the disallowance of the claim had been sustained and refused to pay any part of the claim (R. 11).

Questions Presented.

1. Does an action for general average contribution lie by a cargo owner against the United States, as owner of an Army transport which carried such cargo?

2. Is an action brought by a cargo owner for general average contribution against the United

States as owner of the carrying vessel, upon a general average statement prepared on behalf of the latter, barred by the statute of limitations because not started within six years after the arrival of the vessel at destination, although started within six years after the issuance of such general average statement?

3. Does the judgment violate Section 177 of the Judicial Code in that the general average statement included interest computed upon debits against, and credits in favor of the petitioner to the time of the issuance of the statement?

Summary of Argument.

I.

The claim in question is either founded upon an implied contract with the United States, or is for damages, liquidated or unliquidated, in a case not sounding in tort in respect to which the respondent would be entitled to redress against the United States in a court of equity or admiralty if the United States were suable, and was therefore properly within the jurisdiction of the Court of Claims.

II.

Although the *Logan* could not have been sued *in rem,* it does not follow that the United States is not liable *in personam* for general average. When the sovereign has consented to be sued, its rights and liabilities are judged in the same manner as if it had been a private party. The cases generally recognize no distinction between the commercial or public character of the service upon which a vessel is engaged for the purpose of determining the liability of the Government in general average, salvage, or collision.

Although it is immaterial, the Government's contention that the *Logan* was engaged in military operations is not supported by the evidence.

III.

A cause of action *in rem* for general average arises against the vessel on arrival at the port of destination. Such an action is primarily to obtain security and would result in the preparation of a general average statement by the Court through an average adjuster acting as special master. The vessel owner is under a duty to prepare a general average statement. Another cause of action in favor of the cargo owner arises after preparation and issue of the general average statement by the vessel owner, in which the cargo owner may recover the contribution shown to be due him in such statement. The statute of limitations does not begin to run on the latter cause of action until the general average statement is completed and issued. A contrary rule would cause needless litigation and confusion, and render impossible the universal practice of stating and collecting general average by adjusters employed by the vessel owner.

IV.

The respondent wrote its insurance upon the goods of the Philippine Islands Government and the Manila Railroad Company under valued policies of marine insurance and paid the losses in full. Under such circumstances, it is entitled by subrogation to sue the United States, as owner of the *Logan*, and to recover the full amount of general average contribution with respect to the insured goods.

V.

Although the general average statement, as prepared, included interest on debits and credits from the date of the arrival of the *Logan* at Manila to the approximate date of the issuance of the statement, the United States cannot question such interest, because the statement was prepared by its own adjusters. The inclusion of such interest is in accordance with general practice. Since the cause of action in general average did not arise until the issuance of the general average statement and is based upon such statement, there is no interest allowed upon an over-due account within the prohibition of the statute. A general average statement involves mutual credits and debits, and the United States obtained the benefit of interest upon items with which it was credited.

There is an analogy to those cases in which the United States, although not suable for a particular occurrence, enters court as a litigant in connection with such matter, and it is thereafter held to be subject to all the rules applying to a private litigant, including the payment of interest. Interest has also been held to be payable upon a condemnation award against the Government for property taken for its own use. In the present case, the United States, acting through the Captain of the *Logan,* deliberately chose to flood the hold of the vessel with water in order to extinguish the fire, and thereby destroyed the plaintiff's cargo in order to save its own interest in the hull and other cargo of the vessel. This was a deliberate destruction of plaintiff's property for the petitioner's own benefit.

Argument.

POINT I.

The Court of Claims had jurisdiction.

Under the so-called Tucker Act (24 Stat. 505, 36 Stat. 1136), 28 U. S. C. A., Sec. 250 (1), the Court of Claims is given jurisdiction "of all claims founded upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable". A claim for general average is cognizable in the Court of Claims upon the ground that it is a claim for damages liquidated or unliquidated, not sounding in tort, in a case which could be brought against the United States in a court of admiralty if the United States were suable, and possibly also upon the ground that it is an implied contract. It was held in *Brown* v. *United States,* 15 Court of Claims, 392, that the United States might be sued for a general average contribution due to the owners of a merchant vessel upon which goods belonging to the United States had been shipped.

Salvage claims, even in the absence of any express contract, have been held to fall within the scope of the Tucker Act.

United States v. *Cornell Steamboat Company,* 202 U. S. 184;
The Davis, 10 Wall. 15;
McGowan v. *United States,* 20 Court of Claims, 147;
United States v. *Morgan,* 99 Fed. 570.

The similarity between claims for salvage where no express contract has been made and claims for general average has been recognized by the Courts.

The Davis, supra;
Abbott's Merchant Ships and Seamen, 14th Ed. (1901), page 751.

POINT II.

The voyage of the *Logan* was subject to general average rules.

Stripped of all high-sounding phrases, such as "common maritime venture" and "property having a public status", the Government's argument in Point II appears to be: (1) that the transport *Logan* was engaged in military operations; (2) that no lien liability for general average contribution could arise, and (3) therefore there can be no liability *in personam* against the Government.

We contend that (1) is not true, but it is immaterial; we admit (2), but we contend that (3) is a *non sequitur.*

It makes no difference whether the *Logan* was engaged in a military operation. In fact she was a public vessel, owned by the Government, and immune from attachment, seizure, or any proceeding *in rem.*

The proposition that, because no liability *in rem* against the vessel may be enforced, no liability *in personam* arises against the owner of the vessel is completely answered by this Court in *Workman* v. *City of New York,* 179 U. S. 552, 572. A libel was filed against the City of New York for damages resulting from a collision between a fireboat, owned and operated by the City, and a barkentine. It was urged that no action could be maintained against the

City of New York because the fireboat was engaged in the public service of fighting a fire and could not be attached. This Court reversed the Circuit Court of Appeals and allowed full damages against the City. This Court said:

> "* * * even if it be conceded that the fireboat could not have been seized by process from a Court of Admiralty, the proposition that, therefore, the owner could not be called upon, in an action *in personam,* to respond for the damages inflicted by the boat, is without foundation" (p. 572).

In *United States* v. *The Thekla,* 266 U. S. 328, the steamer *F. J. Luckenback,* while being operated by the United States in war service, collided with the barque *Thekla.* The owners of the *Luckenback* filed a libel and a cross-libel was filed by the owners of the barque, and the two actions were consolidated. Thereafter, a motion of the United States to intervene as a party libelant was granted, and the Government sued upon the libel of the owner of the *F. J. Luckenback.* Upon the trial it appeared that the United States was owner *pro hac vice* of the steamship and that the steamship alone was at fault. It was held that the Government had waived its immunity by intervening, and that it was liable under the cross-libel filed by the owner of the barque to the same extent as if the Government-operated vessel had been privately owned. The sole question considered by Mr. Justice Holmes was whether the Government by intervention submitted itself to the jurisdiction of the Court so as to permit a decree to be entered against it. A decree awarding damages in tort against the Government *in personam* was sustained by this Court, although the vessel clearly could

not have been attached and although the vessel was actually being operated by the Government in war service. See also *In re United States Steel Products Company,* 24 Fed. (2nd) 657 (C. C. A. 2, 1928).

The cases generally recognize no distinction between the commercial or public character of the service upon which the vessel is engaged for the purpose of determining liability of the Government in general average, salvage, or collision. In *Brown* v. *United States,* 15 Ct. Cls. 392, the Government was held liable to contribute in general average for military supplies which were being shipped to the Quartermaster of the United States Army. In *Prince Line, Ltd.* v. *United States,* 61 Ct. Cls. 632, the Government was held liable for salvage services rendered to a privately-owned vessel while it was being operated by the Government in war service. In *United States* v. *Wilder,* 28 Fed. Cas. 16694, Mr. Justice Story, after an exhaustive consideration, decided that property of the United States was subject to contribution in general average to the same extent as property privately owned. See also Phillips, Insurance, Vol. 2, Section 1345; Arnould, Marine Insurance, 11th Ed., Vol. 2, Section 973.

Thus the fact that there is no liability *in rem* against the vessel, or that the vessel is engaged in military or other public service, has no bearing on the question of the liability *in personam* of the United States.

The sole question is whether the Government has waived immunity from suit, or has consented to be sued. We have shown in Point I that the Government has consented to be sued for a contribution in general average in the Court of Claims.

The question whether a vessel is engaged on a public mission has no bearing on the real purpose of

the doctrine of general average, viz., to permit the master to exercise his best judgment in time of stress and danger in the selection of the interest to be sacrificed to save the adventure. If the doctrine of general average is not applicable to voyages of Government vessels on a public mission, the master might well feel an obligation to sacrifice cargo owned by others rather than any property of his employer, the Government.

The fundamental purpose of general average is well set forth in *Lowndes on General Average,* 6th Ed., pp. 14, 15:

> "Nothing can more tend to the preservation of life and property at sea than that the officer entrusted with this important function should be protected in the exercise of it from whatever may tend to bias or disturb his judgment at that critical moment. He is, however, the paid servant of the shipowner, liable to dismissal if he displeases him. How is he to avoid partiality, or the suspicion of partiality, when he has to determine by what sacrifice he shall avert a common danger, and to choose, perhaps, between a jettison of cargo and the cutting away of a mast, or bearing up for a port of refuge? Will there not be frequent complaints, well or ill founded, by the merchant or his underwriters, that a costlier sacrifice of cargo has been preferred when a measure less destructive, but involving a loss to the shipowner would have been equally effectual? The rule of a general contribution, on the other hand, by rendering it immaterial whose property is taken in the first instance, and material only that that should be taken which will most surely and effectually, and at least cost, save the whole, does away with this conflict in the

captain's mind between interest and duty, leaves him alone with purely nautical considerations, and thus, no doubt, does more than any statesman or philanthropist can effect for the preservation of life and property at sea. The utility of the rule of general average thus no doubt explains its universality and permanence."

In the leading case of *Barnard* v. *Adams,* 10 How. 270, this court set forth the three requisites of general average at p. 303:

"In order to constitute a case for general average, three things must concur:

1st. A common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently 'inevitable', except by voluntarily incurring the loss of a portion of the whole to save the remainder.

2d. There must be a voluntary jettison, *jactus,* or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril, *periculi imminentis evitandi causa,* or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

3d. This attempt to avoid the imminent common peril must be successful."

All three of these requisites specified by this Court were present in the case at bar: (1) The fire on the transport *Logan* was admittedly and obviously a common danger to ship and cargo. (2) The use of water to extinguish a fire at sea has been repeatedly held to be a voluntary sacrifice. *Ralli* v. *Troop,* 157 U. S. 386. (3) The fire was extinguished, and the transport *Logan* and her cargo arrived safely

at destination, although the cargo insured by the respondent was seriously damaged by the sacrifice.

If the sacrifice had been on the part of the vessel, such as cutting the decks or incurring port of refuge expenses, there would have been no question but that the cargo would have been compelled to contribute, and the question whether the vessel was engaged in military operations would have been immaterial. Surely, the doctrine of general average, which is equitable in its nature, should be enforced against the Government as well as in the Government's favor. In the present case, there is no question but that the United States as owner of the vessel benefited by the sacrifice of the cargo insured by the respondent in the saving of its vessel, which otherwise would have been lost or seriously damaged by the fire.

Although we believe it is immaterial, the Government's contention that the transport *Logan* was engaged in military operations is not supported by the evidence. The voyage commenced almost a month after the Armistice; the *Logan* sailed from San Francisco on December 5, 1918, with cargo consigned to various ports on the other side of the world from the theatre of war (R. 8). The *Logan* was carrying the goods in question because the war emergency had necessitated the transfer of ships regularly operating in the commercial service in the Pacific to the Atlantic (R. 8). There is no evidence in the case as to the nature or character of the cargo belonging to the United States on board the *Logan*. The cargo insured by the respondent consisted of miscellaneous supplies, principally stationery, books and medical supplies (R. 9). Clearly, therefore, the *Logan* was not engaged in military operations, at least so far as the cargo insured by the respondent is concerned. It is not contended that the absence of freight pay-

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able by the consignee changed the character of the service from a commercial service into a military operation.

The relationship between the cargo insured by the respondent and the transport *Logan* was in fact merely that of cargo and carrying vessel. The goods and the vessel belonged to different legal entities that were distinct and separate from each other. It was only because of the shortage of commercial vessels that the carriage was made on an army vessel. The common venture, which is the basis of general average, is not the hope of gain on the part of the vessel owner, but is the physical venture of a vessel putting to sea with cargo on board, and encountering the risks incident to such voyage.

POINT III.

The cause of action is not barred by the Statute of Limitations.

A six year statute of limitations is provided for suits in the Court of Claims Act of March 3, 1911, Ch. 231, Sec. 156, 36 Stat. 1139. The question is whether this statute began to run from January 19, 1919, the date of the arrival of the transport *Logan* at destination, or from December 31, 1926, the date on which the general average statement was issued. The petition was filed in the Court of Claims on February 18, 1929.

The Court of Claims upheld respondent's contention that the six year period of limitation in the present action did not begin to run until the issue of the general average statement in 1926.

The case most closely in point is *The Allianca,* 64 Fed. 871 (S. D. N. Y.—1894), affirmed 79 Fed. 989 (C. C. A. 2—1896). This was a suit by an

underwriter on cargo to enforce a claim for general average against the proceeds of the vessel. The voyage was from New York to Rio in June, 1889. In December, 1889 a mortgage was executed on the vessel to a mortgagee who had no knowledge of the claims in general average. The shipowner became insolvent in February, 1893, and the libel to recover general average was filed on June 30, 1894. The defence was laches, and the mortgagee claimed to have been prejudiced by the delay in the bringing of the suit to collect the general average. Judge Addison Brown, whose decisions in admiralty are accorded the highest respect, held in the District Court that the libelant had not been guilty of laches, since the general average statement had not been issued until nearly a year and a half after the mortgage was given. He said at page 873:

> "Although the jettison that gave rise to the lien happened before the mortgage was executed, the average was not adjusted, nor was any claim upon the ship capable of enforcement, until nearly a year and a half after the mortgage was given. Up to that time the lien was inchoate only, and there were no laches."

The Circuit Court of Appeals, Second Circuit, affirmed on Judge Brown's opinion, 79 Fed. 989.

This case was cited with approval in *Frederick H. Leggett & Co.* v. *500 Cases of Tomatoes,* 15 Fed. (2nd) 270 (C. C. A. 2—1926) which involved the question whether a shipowner was entitled to insist upon payment in cash of the contribution estimated to be due from cargo as a condition to the delivery of such cargo to the consignee. The court held that the consignee of the cargo was entitled to the goods upon presentation of a general average bond with

sufficient surety. Judge Hough, another outstanding admiralty Judge, writing the opinion of the court, said, in referring to the lien for general average:

> "Until an adjustment is made, the lien under consideration is inchoate; it attaches, but its amount cannot be ascertained until adjusted." Citing *The Alhanca, supra.*

On the other hand, reciprocal rights of action *in rem* by vessel owner against cargo, and by cargo owner against vessel, to secure the lien for general average contribution, unquestionably exist at the time of the arrival of the vessel. Unless the vessel owner were entirely responsible, and resided at the port of destination, the cargo owner might be greatly prejudiced from a practical point of view by allowing the vessel to depart from the port without attaching her and obtaining security. Likewise the vessel owner might be greatly prejudiced if he could not enforce his lien against the cargo before delivery. The almost universal practice, however, is for the vessel owner to take a general average bond before delivery of the cargo. The cases establishing the existence of such reciprocal actions *in rem* to obtain security for general average contributions between vessel and cargo at the time the vessel arrives and before a general average statement is prepared, are as follows:

Cases against vessel:

> *Dupont* v. *Vance,* 19 How. 162 (1856);
> *"The Eugenia J. Diacakis",* 1923 A. M. C. 305 (S. D. N. Y., 1923).

Case against cargo:

> *Wellman* v. *Morse,* 76 Fed. 573 (C. C. A., 1—1896).

See also:

Frederick H. Leggett & Co. v. *500 Cases of Tomatoes, supra.*

The Government relies on a dictum of Judge Learned Hand in *Det Forenede Dampskibs Sellskab* v. *Insurance Company of North America,* 31 Fed. (2nd) 658 (C. C. A., 2nd—1929). This case involved the date on which the rate of exchange should be fixed in computing payments to be made by cargo on a general average adjustment and involved no question of laches or statute of limitations. He held that the lien upon cargo for general average contribution arose at the arrival of the vessel and that a right of action upon an implied promise to pay by the cargo owner arising upon delivery accrued at that time, and the rate of exchange on that date was adopted. Judge Hand considered only the question whether a general average adjustment was a condition precedent to a right of action. In other words, all that he was interested in was to determine whether *any* cause of action arose at the time of the arrival of the vessel at destination. In discussing *"The Alliance"*, he clearly distinguished the question of laches from the question as to the date as of which the rate of exchange should be computed.

In the case at bar, no action *in rem* could have been maintained against the transport *Logan,* because she was a public vessel. *"Western Maid"*, 257 U. S. 419; *"The Siren"*, 7 Wall. 152. Even if she had been a private vessel, we contend that the right of action which would have arisen at the time of the arrival of the vessel would have been in the nature of an action to obtain security by the enforcement of a lien, rather than a suit upon a liquidated obligation.

We submit that it is apparent from the above authorities that a cargo owner has two causes of action upon a general average sacrifice, one arising upon the arrival of the vessel, and the second arising upon the completion of the general average statement by the vessel owner.

The cause of action upon the general average statement differs from the earlier cause of action dating from the arrival of the vessel, in that it is based upon the statement, which is binding upon the ship owner, at least in the absence of mistake or fraud. *The Santa Ana,* 154 Fed. 800 (C. C. A.—9, 1907). It is an action for a definite sum owing by one or more designated interests, whereas a suit started upon the arrival of the vessel is merely to have a general average stated and to recover such amounts, if any, as libelant may eventually be found entitled to.

Upon the arrival of the vessel at destination, where a general average sacrifice has occurred in the course of the voyage, the ship owner still has the following duties to perform with reference to general average:

1. He must obtain either a sufficient deposit of cash or sufficient security to cover possible contributions in general average owing by the respective shipments of cargo before delivering the same.

2. He must prepare or cause to be prepared by an average adjuster the general average statement showing the computation of general average and the amounts payable and receivable by the respective interests.

3. He must either himself or through his agent, the average adjuster, collect the net amounts payable by the debtor interests in general average and disburse such amounts to the creditor interests.

This Court has held that the United States as owner of the transport *Logan* was under a duty to prepare or cause to be prepared the general average statement in the present instance. Johnson & Higgins of California were employed as average adjusters by the War Department to prepare the general average statement, and after it was completed, the Comptroller General refused to approve of the payment of their fee. The Supreme Court reversed the decision by the Court of Claims (74 Ct. Cl. 331) which had supported the ruling of the Comptroller General. *Johnson & Higgins of California* v. *United States,* 287 U. S. 459. Chief Justice Hughes, writing the opinion, said in part as follows:

> "The Solicitor General, while not formally confessing error, and while reserving the question whether the Government was liable to contribute in general average, is in accord with petitioner's contention that the proper officer of the Government was authorized to employ petitioner for the purpose stated. We are of the opinion that this view is correct. In the circumstances, petitioner's right did not depend upon the determination of the liability of the Government to contribute in general average. The question of that liability could not be regarded as free from doubt. The cargo underwriters had made claim for contribution and the Judge Advocate General of the Army had advised that the claim was valid. On receiving this information, it was the duty of the officer responsible for the operation of the vessel to prepare the general average statement in order that the basis for adjustment might be available. *Ralli* v. *Troop,* 157 U. S. 386, 400. That duty, in this instance, apart from the question of the liability of the Govern-

> ment for general average as to which it is not now necessary to express an opinion, lay with the general superintendent and administrative officers of the Army Transport Service, and in order that he might properly perform it, he was entitled to avail himself of the assistance of general average adjusters."

The duty of the shipowners to prepare a general average statement was also clearly laid down in the *Emilia S. De Perez,* 22 Fed. (2nd) 585 (D. C. Md. 1927), in which the Court stated as follows:

> "From the very origin of general average it appears to have been the duty of the master, as representative of the shipowners, to make general average adjustments. The master has universally and consistently been looked upon as the responsible party. *Ralli* v. *Troop,* 157 U. S. 386, 400, 15 S. Ct. 657, 39 L. Ed. 742. The custom has, to be sure, grown up of engaging adjusters for convenience sake, who can familiarize themselves with and work out the rather difficult problems of accounting that are involved in many of these cases. But there is no custom which substitutes, in the eyes of the law, the adjuster for the master. As has been pointed out, it would be wholly impracticable for each cargo owner to sue every other cargo owner separately and to try to make up an adjustment piecemeal. Some one must act as trustee, with the responsibility of perfecting the adjustment, and it has been consistently held that this duty rests upon the master (representing the owner) of the ship."

Until the vessel owner has expressed an intention to refuse to perform these obligations, or until he has failed to perform them after the lapse of a reasonable

time, there is no basis or reason for the cargo owner to sue him *in personam*. The plaintiff in the present case, after the Judge Advocate General had held that general average was properly payable by the Government to the plaintiff, and after the War Department had employed Johnson & Higgins of California to prepare a general average statement, would have been ridiculous in instituting an action against the United States which would have resulted in the preparation of a general average statement by the Court, with a duplication of expense, and in the assumption by the plaintiff of the burden of proving facts wholly within the knowledge of the War Department.

We have found no case where a right of action *in personam* against the vessel owner has been maintained at the time of the arrival of the vessel at destination and before the shipowner has caused a general average statement to be prepared, or has failed or refused to cause the preparation of such statement. The Court below held that no right of action *in personam* against the United States existed prior to the issue of the general average statement (R. 14, 15).

If such an action *in personam* could be maintained, its purpose would be to have the Court appoint some general average adjuster as Special Master to prepare a general average statement. The cargo owners would then be obliged to assume the burden of proving the facts necessary to a general average statement, such as value of the vessel, the sound values of all the cargo on board, the amount of freight, the amount of damage resulting from the general average sacrifice to the vessel, to the various lots of cargo, and to the freight. This is a serious burden for cargo owners to assume. The maritime law, however, places the duty of assembling all these facts

and figures and preparing a general average statement upon the vessel owner. *Johnson & Higgins* v. *U. S.*, 287 U. S. 459, *supra*. The vessel owner either has knowledge of all the above facts and figures or has ready access to the means of obtaining them; whereas the cargo owner has neither. Moreover, in the interests of order, it is necessary that one person should undertake the gathering of the necessary information, the preparation of the necessary computations therefrom, the collection of the payments and their distribution, and this duty the law has quite properly imposed upon the vessel owner. The rule which the Government proposes would deprive cargo owners of the benefit of this duty, and would reach the extraordinary result that although the law had imposed upon the vessel owner the duty of preparing the general average statement and carrying out the details of its adjustment, and although such duty had been imposed for the benefit of cargo owners, cargo owners must at their peril bring suit within six years after the arrival of the vessel and without waiting to receive the benefit of the performance of the vessel owner's duty. In other words, the lapse of time might deprive cargo owners not only of the benefit of the performance of the duty by the vessel owner, but even of the right to recover contribution at all, and this might be so even though the vessel owner was continuing to perform his duty and had not repudiated the same. Although the duty imposed upon the vessel owner for the benefit of cargo owners is presumably of substantial benefit and value to the latter, the vessel owner would not only be relieved from completing performance of such duty, but would also be relieved from any liability even to contribute in general average, if the

vessel owner had not within six years after the arrival of the vessel completed the performance of his duty with reference to the general average. Any such contention, if supported, would not only vitiate the underlying reason for imposing the duty upon the vessel owner to adjust general average, but would also defeat the whole scheme and practice of general average and would be a travesty upon justice.

There are many analogies of successive causes of action in connection with the statute of limitations. The closest analogy is the case of anticipatory breach of a contract, where the injured party may either bring suit immediately upon the first breach, or may treat the contract as continuing and wait until the time has elapsed for complete performance. In *Foss-Schneider Brewing Co.* v. *Bullock,* 59 Fed. 83 (C. C. A. 6, 1893), the seller refused to accept a breach of contract by the purchaser of goods to be delivered over a period of time, but, on the contrary, proceeded to tender further deliveries of goods and sued for the contract price. The defendant pleaded that the cause of action had arisen when the original breach occurred, and that the period of the statute of limitations had run in the meantime. The Circuit Court of Appeals, Sixth Circuit, Mr. Justice Taft writing the opinion, held that the cause of action accrued, not at the time of the first breach of contract by the purchaser, but at the time of the final tender of goods and subsequent refusal by the purchaser to accept them, and that the statute of limitations was consequently no defense.

The same rule was applied in *Cleveland Rolling Mill* v. *Rhodes,* 121 U. S. 255, and in *Roehm* v. *Horst,* 178 U. S. 1.

In *Ga Nun* v. *Palmer,* 202 N. Y. 483, decedent had made a contract to pay the plaintiff a certain sum

per month and a certain amount at the time of decedent's death for taking care of decedent. The decedent during his lifetime did acts which constituted a breach of the contract, and after decedent's death, the plaintiff brought suit against decedent's estate for breach of the contract. It was held that the statute of limitations ran from the date of final breach by decedent, namely, the date of decedent's death, even though suit might have been brought at an earlier date. Similar decisions are *Wold* v. *Wold*, 138 Minn. 409; *Heery* v. *Read*, 80 Kan. 380.

In one sense, the anticipatory breach cases lay down a rule which is even more liberal to the plaintiff in respect to the statute of limitations than is necessary to permit recovery by the plaintiff in the present case. In the usual anticipatory breach case, there has been a refusal to perform by the defendant at some time prior to the final act of performance due from the defendant, and the plaintiff, though thus put on notice that the defendant will not perform, nevertheless goes ahead and performs the contract. In the present case, the Judge Advocate General ruled that there was general average payable, and the defendant proceeded to perform the obligations on its part by causing a general average statement to be prepared, a proceeding which covered the period from August, 1922, to December 31, 1926. It was not until the refusal of May 28, 1928, by the Comptroller General to approve of the payment by the United States of its share of the contribution that there was any refusal by the United States to perform its obligations. Thus the Government was performing its obligations and gave no intimation of a refusal to pay until May 28, 1928. This suit was started within nine months thereafter, or within two months and eight days after the application for

a review of the disallowance of the claim had been denied on December 10, 1928, by the Comptroller General. Under these circumstances any claim that the suit should be barred by limitation is inequitable and without basis in law.

Another close analogy is to be found in the cases where there are two successive times fixed by a contract for the performance of an act. Thus, in the case of a note payable on demand or at death, it was held that the holder might wait until the death of the maker, and that the statute of limitations began to run from that date, although, had the note been merely payable on demand, the statute of limitations would have barred suit thereon. *Harris* v. *Townsend,* 101 Miss. 590.

Likewise in the case of a mutual open account between two parties where there has been an account stated, the statute of limitations begins to run from the date of the statement of the account.

Louisville & N. R. R. Co. v. *United States,* 47 Ct. of Cl. 129 (1911);
Morgan v. *Lehigh Valley Coal Company,* 215 Penn. 443 (1906);
Figge v. *Bergenthal,* 130 Wis. 594 (1907);
Ellison v. *Weintrob,* 139 Va. 29;
Slayback v. *Alexander,* 179 App. Div. (N. Y.), 696 (1917).

On the other hand, had there been no statement of account in such a situation, the statute of limitations would run from the date of the last item in the account.

Green v. *Disbrow,* 79 N. Y. 1 (1879);
Minion v. *Warner,* 238 N. Y. 413 (1924);
Kennedy v. *Drake,* 225 Mass. 303.

The analogy between an account stated and a general average statement is obviously close. The Government on page 14 of its brief objects to the analogy to an account stated on the ground that there is no authority in an executive officer or agent of the Government to issue an account stated after the statute of limitations has barred a cause of action. The situation is quite different, however, from an ordinary account stated in that in the ordinary case there is no duty to state an account; whereas in the case of general average it has been held to be the duty of the vessel owner to prepare and issue the general average statement. *Johnson & Higgins* v. *United States, supra.* The respondent does not contend that a general average statement is in all respects an account stated, but does urge that for the purposes of the statute of limitations there is a close analogy.

The rule that the statute of limitations in a suit brought upon the general average statement does not begin to run until the issue of the statement by the adjusters accords with commercial practice and business necessity (R. 12). General average adjusters, both in England and America, are men of specialized training and of the highest integrity and character and they are looked upon as professional men. This indicates the complexity of a general average statement and also indicates that a general average statement prepared by a well-known adjuster, even though employed by the vessel owner, has almost the binding effect of an arbitration. In practice it is extremely rare that a general average statement prepared by such an adjuster as Johnson & Higgins is ever questioned. It would thus be an encouragement to fruitless litigation to require a cargo owner to bring suits before the general average statement is issued.

The custom of deferring collection and distribution of general average payments until after the preparation of the statement (R. 12) is based not merely on convenience but on necessity. The facts which are the necessary basis for preparing a general average statement are numerous and complicated, and must be gathered frequently from widely separated and distant points. Briefly outlined, it is necessary to obtain at least the following information:

1. The sound value of the vessel;

2. The amount of any damage occurring to her during the voyage either by reason of general average sacrifices or otherwise;

3. The sound value of each shipment of goods at port of destination;

4. The amount of damage other than general average occurring to each shipment of goods in the course of the voyage;

5. The amount of general average sacrifice as to each shipment of goods during the voyage;

6. The amount of all expenditures made either by the vessel or by any other person which were general average expenditures.

The proper ascertainment of the foregoing facts involves the procuring of detailed and elaborate surveys and reports, and, after all the data has been assembled, the making of complicated computations. Until the statement has been prepared, it is impossible to know the amount which is to be paid or to be received by each of the interests involved in the voyage and, accordingly, the making of the payments and the distribution of the payments thus made must of necessity await the issue of a general average statement. In cases involving complicated facts, and particularly where correspondence between distant ports is neces-

sary, the preparation of a general average statement may be delayed, as in the present case, for years after the arrival of the vessel at the port of destination, even although the average adjusters proceed with all due diligence. Were the rule that the statute of limitations is to begin to run from the date of the arrival of the vessel at the port of destination, it would make it well nigh impossible for the average adjusters to work out the adjustment of the average in the usual and orderly course of business, since each interest which was, or had any reason to believe that it might possibly be, a creditor in general average would be forced to start suit, before the end of six years from the arrival of the vessel, against all other interests which might be debtors in general average. On the other hand, the interests which might be debtors would be not only the vessel owner, but the owners of any other shipments of goods on the vessel, and this in turn might entail a large number of suits, possibly in many different jurisdictions, since the owners of different shipments of cargo might well be scattered throughout the world. The fact that suits might eventually have to be brought to protect the interests of each of the creditors in general average might mean that it would in each instance become necessary to start suit upon arrival of the vessel when the debtor cargo or vessel was at hand instead of waiting and permitting the debtor interests to disperse. Such a practice would be expensive and highly inconvenient to all concerned, both creditor and debtor interests alike.

The practical result of applying the rule that the statute of limitations runs from the date of the arrival of the vessel at port of destination would be so disastrous and so contrary to commercial practice as to throw the strongest doubt upon the soundness of such a rule.

POINT IV.

The respondent as insurer was entitled to the full amount of the award of the Court of Claims.

The United States contends in Point III of its brief that an insurer may recover in its own name by subrogation not more than the amount of the loss that it paid to the assured and that therefore the award of the Court of Claims was excessive. The cases cited on page 24 of its brief, however, do not support the proposition for which they are cited. *Fairgrieve* v. *Marine Ins. Co.,* 94 Fed. 686, and *Norwich Union Fire Ins. Soc.* v. *Standard Oil Company,* 59 Fed. 984 are not in point because in each an underwriter had sued in its own name when it appeared that it had insured only a part of the interest. The other cases cited involve other irrelevant propositions.

In the present case, although the policies of insurance are not printed in the present record, they were in evidence in the Court below, and a reference to them will show that they were valued policies, and it is stated in the record that the full amount of the losses was paid (R. 10). There was no other insurance involved, and the record fails to disclose any facts showing that the original owners of the goods, having been paid their losses in full by the plaintiff, retained any interest whatsoever in the proceeds of the litigation. If there were any question present concerning a recovery in excess of the loss paid by the underwriter, it would arise only between the underwriter and the assured, and it would be no concern whatever of the debtor. *Propellor Monticello* v. *Mollison,* 17 How. 152.

In *Mobile & Montgomery Ry. Co.* v. *Jurey,* 111 U. S. 584, at 594, this Court said, in considering the right of subrogation:

> "Insurers of a ship which has been run down and sunk by the fault of another ship, are, upon their payment of a total loss, subrogated to the right of the insured to recover therefor against the owners of the latter vessel, and if their policy was a valued one, their payment of its value will give them the whole *spes recuperandi,* and the right to the whole damages, though the insured vessel was, in fact, worth a larger sum than the valuation named in the policy."

No case has been found where an underwriter has paid the entire loss under a valued marine policy and has been denied the right to bring suit in its own name to enforce a subrogated right. There can be no question but that the owners of the goods could have sued in their own right in the present case, and since no uninsured interest is shown to have been left in the assured, it would be a denial of the full right of subrogation to hold that the plaintiff underwriter may not enforce fully its subrogated rights.

As a matter of fact, the amount of the original contribution in general average which is recoverable by a cargo owner from the other interests, could never equal, much less exceed, the amount of the loss or damage to the goods, because the amount made good in general average to the owner of goods which have been sacrificed is always diminished by the percentage of loss to be borne by each interest at stake. The plaintiff, having insured the goods against marine risks, including fire, therefore paid the full amount of the loss and is subrogated only to the claim of the

owner in general average, which is inevitably smaller in amount than the original loss. In the present case, the aggregate of the losses paid by the plaintiff to its assured was $38,996.22, and the original amount of the allowance in general average with reference to the goods of the Philippine Islands Government and the Manila Railroad Company totaled $38,133.76. The fact that subsequent adjustments increased the latter amount to the amount of the judgment, does not show that the assured is recovering more than the amount of its loss in such a sense that any rule of subrogation would declare the recovery to be excessive. It must be remembered that the payments of losses to the assured were made in 1919, 1920 and 1921, and that the payment by the United States to the plaintiff will not be made until 1935, some fourteen to sixteen years later, and that the underwriter has been deprived of the use of the money in the meantime. There is hardly, therefore, any question of profit on the part of the underwriter involved in the present case.

POINT V.

The judgment of the Court below did not erroneously include interest.

The general average statement, as prepared, included interest on both debits against and credits in favor of the Government, from the date of the arrival of the vessel at Manila to a period several months subsequent to the date of issuance of the general average statement. This is in accordance with the usual practice in the preparation of a general average statement. Congdon, General Average, 2nd Ed. page 165. Rule 2 of the Rules of Practice of the Association

of Average Adjusters of the United States, quoted on page 187 of Congdon, states as follows:

> "Where allowances, sacrifices or expenditures are charged or made good in general average, interest shall be allowed thereon at the legal rate prevailing at the place of adjustment."

The general average statement was prepared by Messrs. Johnson & Higgins, experienced general average adjusters employed by, and acting under the direction of, the defendant. The defendant should not therefore be heard to object to the provisions of a statement so prepared.

The cause of action upon which this suit was brought arose upon the issuance of the general average statement and is based upon the net credits shown in such statement to be due to respondent's assured. There is therefore no question of a violation of Section 284 of Title 28 of the United States Code. No interest has been allowed by the judgment of the Court for the delay subsequent to the arising of the cause of action upon the issue of the general average statement.

In this case it would be virtually impossible to have prepared a statement which would have included the computation of interest in favor of and against the parties other than the United States, but would have embodied no interest either for or against the United States. In the case of the general average statement as issued, the interest which was computed on items in favor of the United States, was, of course, applied to diminish the amount payable by the United States, and correspondingly the amount receivable by the plaintiff. The computation of interest up to approximately the date of issue of the general aver-

age statement was therefore inextricably involved in the preparation of such statement and in the making of proper adjustments between the interests at stake.

It is generally held that interest is payable upon a condemnation award against the Government for the value of property condemned and on claims for property taken by the Government for its own use without the formality of condemnation.

> *Phelps* v. *United States,* 274 U. S. 341;
> *Jacobs* v. *United States,* 290 U. S. 13;
> *United States* v. *Rogers,* 255 U. S. 163.

The theory of these cases is that interest is an integral part of the claim for compensation and is allowable despite the provisions of Section 284 of Title 28 of the United States Code. In *The Nuestra Senora de Regla,* 108 U. S. 92, the Government was held liable not only for the charter hire of a foreign vessel which the Army had used without the owner's permission, but was also held liable for full interest thereon.

The allowance of general average to the plaintiff against the United States in the case at bar is in reality the payment of compensation for property taken by the Government for its own benefit. The Government, acting through the captain of the *Logan,* deliberately chose to flood the hold of the vessel with water in order to extinguish the fire, and thereby destroyed the plaintiff's cargo in order to save its own interest in the hull and certain other cargo of the vessel. This was a deliberate destruction of plaintiff's property for the benefit of defendant's property. The plaintiff under the authority of the foregoing cases is entitled to just compensation, which includes interest.

In *Standard Oil Company* v. *United States*, 267 U. S. 76, an action was brought against the United States on a policy of war risk insurance on a vessel. The question arose as to whether interest could be recovered against the United States from the date of the casualty to the date of the judgment, and this Court said at page 79, in holding the United States liable for such interest:

> "When the United States went into the insurance business, issued policies in familiar form, and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suit in such business."

In *United States* v. *Thekla*, 266 U. S. 328 (*supra*, p. 11), this Court included interest on damages for collision in a judgment against the Government in a case in which the Government intervened. In *Noamlooze etc.* v. *Moran Towing & Transp. Co.*, 11 Fed. 2nd 377 (S. D. N. Y. 1925) interest was allowed against the Government upon a counterclaim.

On pages 25 and 26 of the Government's brief, it is contended that the recovery by the plaintiff should be cut down to $29,223.68 by the elimination of the item of $18,875.72. An examination of pages 42, 49 and 53 of the general average statement, however, shows that the gross debit in general average against the Philippine Islands Government and the Manila Railroad Company of $8,909.08 includes $2,784.47 of interest to the approximate date of the issuance of the statement. If, contrary to the decision of the Court of Claims and the contentions of the plaintiff as above outlined, this Court should hold that the item of $18,875.72 is not properly included in the judgment, then any interest with which the plain-

tiff's goods were charged in favor of the United States, should also be eliminated. This would reduce the debit in general average payable by these interests from $8,909.08 to $6,124.61, and deducting the latter amount from the credit allowance of $38,132.76 would leave a balance receivable in any event of $32,008.15.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed, with costs.

J. M. RICHARDSON LYETH,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 21.—October Term, 1935.

The United States, Petitioner, vs. Atlantic Mutual Insurance Company. } On Certiorari to the Court of Claims.

[May 25, 1936.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This was a suit to obtain a contribution in general average by reason of the sacrifice of part of a ship's cargo for the benefit of the ship and cargo as a whole. The Court of Claims gave judgment for the claimant, — Ct. Cl. —, and the case is here on certiorari. The material facts, as shown by the findings below, are as follows:

In 1918 the Logan, an army transport owned and operated by the United States, left San Francisco for Manila with a cargo consisting of military supplies belonging to the United States, certain property belonging to the government of the Philippine Islands and its railroad, and other property belonging in large part to the American Red Cross and in lesser part to officers of the United States Army, none of which was being transported for hire. During the voyage fire broke out in the hold from a cause free from negligence, and to prevent a loss of both vessel and cargo the master caused part of the cargo to be jettisoned and water to be let into the hold, whereby other parts of the cargo were damaged. After the fire was extinguished the transport continued the voyage and arrived at the port of destination January 19, 1919. All that remained of the cargo was then discharged and, with the master's assent, was delivered to its owners without obtaining from them any bond to secure payment of general average.

The part of the cargo belonging to the Philippine government and its railroad was insured against marine perils, including fire, by policies obtained before the voyage was begun. Substantial portions of this property were jettisoned or damaged at the time of the fire. April 12, 1921, the underwriter, in compliance with the policies, paid to the Philippine government and its railroad the

amounts of their respective losses, and thereby became subrogated to their rights, if any, under the maritime rule respecting general average.

May 15, 1921, the underwriter presented to the War Department a claim for general average contribution based on the facts here stated, and the claim was denied. But the Judge Advocate General disapproved that ruling and gave an opinion that the claim was well grounded. Thereafter, on August 22, 1922, an administrative officer in the army transport service transmitted the files relating to the claim to a company doing business as an average adjuster and insurance broker at San Francisco and requested that the adjuster prepare "a statement of general average in order that the responsibility of the various parties concerned may be determined". The adjuster accepted that task and completed and rendered such a statement December 31, 1926. In this statement the adjuster computed the net contribution to be made by the United States to the underwriter by reason of the latter's subrogation to the rights of the Philippine government and its railroad at something over $40,000; and also computed the contributions to be made to the underwriter by other cargo owners. On March 28, 1928, the accounting officers of the United States denied the claim for contribution, and on December 10, 1928, the Comptroller General, on review, sustained that ruling. The claimant brought the present suit in the Court of Claims February 18, 1929.

One of the defenses interposed by the government and rejected by the court is that the claim had become completely barred before the suit was begun. The statute[1] invoked by this defense declares:

"Every claim against the United States cognizable by the Court of Claims shall be forever barred unless the petition setting forth a statement thereof is filed in the court . . . within six years after the claim first accrues."

The government contends that the claim first accrued on January 19, 1919, when the transport reached its destination and delivered what remained of the cargo to the cargo owners. On the other hand, the claimant insists the claim first accrued on December 31, 1926, when the adjuster completed and rendered the general average statement. The court rejected the government's contention and sustained that of the claimant. In this we think it erred.

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[1] U. S. C., Title 28, § 262.

The court recognized that the transport, had it been privately owned, would have become subject to a suit *in rem* for contribution in general average upon its arrival at destination and the delivery of the cargo, but held that as the transport was government owned and in the public service such a suit would not lie against it. We assent to this, but think the accrual of the right to contribution did not depend upon whether it could be enforced by a suit *in rem* against the ship. Such a right accrues if and when all the elements essential to its existence are present, regardless of whether the appropriate means of enforcement be a suit *in rem* or a suit *in personam*. In this instance, as we shall show, a suit of the latter class was the appropriate means.

The law of general average is an ancient feature of the maritime law and proceeds on the equitable principle that that which is sacrified by one for the benefit of all in the course of a common venture at sea should be made good by the contribution of all.[2]

Various means of enforcing such contribution have become well recognized, such as a suit *in rem* in admiralty against ship or cargo, a suit *in personam* in admiralty against ship owner or cargo owner,[3] and an action at law[4] or a suit in equity[5] against ship owner or cargo owner. Save for exceptional rulings afterwards disapproved, the courts in dealing with such suits and actions have regarded the right to contribution as accruing and becoming enforceable upon the arrival of the ship at the port of destination and the delivery of the cargo. In reason the rule could not well be otherwise, for every element of the right is then present. That the amount of the required contribution may then be unliquidated is no obstacle, for in proper sequence liquidation comes after accrual, and can be made in the suit or action wherein the right is presented for adjudication. In this regard a claim for contribution does not differ from many others where at the time

[2] Barnard *v.* Adams, 10 How. 270, 303; Ralli *v.* Troop, 157 U. S. 386; Simonds *v.* White, 3 Barn. & Cress., 805, 811.

[3] Bark San Fernando *v.* Jackson, 12 Fed. 341; The Emilia S. De Perz, 22 Fed. (2d) 585, 586; Det Forenende Dampskibs Selskab *v.* Insurance Company of North America, 31 Fed. (2d) 658 (certiorari denied, 280 U. S. 571; Kohler & Chase *v.* United American Lines, 60 Fed. (2d) 530. And see Insurance Co. *v.* Dunham, 11 Wall. 1; 1 Benedict on Admiralty, 5th ed. § 98.

[4] Birkley *v.* Presgrave, 1 East. 220; Price *v.* Noble, 4 Taunt. 123; Dodson *v.* Wilson, 3 Camp. 480; Strang Steel &c. Co. *v.* A. Scott & Co.; L. R. 14 App. Cas. 601, 606-607.

[5] Sturgess *v.* Cary, Fed. Cas. No. 13,572; 1 Story's Equity Jur. 14th ed. §§ 661 *et seq.*

of accrual the recoverable damages or amount due remains unliquidated. As was well said in a related case,[6] "The law is familiar enough in actions of tort and in many actions in contract, with liabilities which are presently due, although unliquidated".

The United States is not suable without its assent, and therefore a suit *in personam* against it as the owner of the vessel needed the support of a permissive statute. But there is such a statute,[7] which has been long in force. It in direct terms invests the Court of Claims with jurisdiction to hear and determine all claims against the United States founded—

"upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

It is under this statute that claims against the United States for general average contribution are brought and adjudicated in the Court of Claims. Obviously the statute contemplates that a claim may accrue and be sued on even though the damages sought be unliquidated.

For these reasons we think it quite plain that the present claim accrued January 19, 1919, when the ship reached its destination and the cargo was delivered.

The court below attached much importance to the statement in general average made by the adjuster at the request of an administrative officer in the army transport service. Indeed, the court treated the statement as being "in the nature of an account stated", and ruled that the right to contribution accrued when it was rendered. In this we think the court misconceived the functions of the adjuster and the nature of the statement. The adjuster was not an arbitrator,[8] nor was the statement anything more than a provisional estimate and calculation which his principal, the owner, was free to adopt or to put aside. In the absence of some stipulation on the subject, and there was none, his function was only that of aiding or assisting the owner in gathering and stating data and making appropriate calculations as a suggested basis for an adjustment to be made by the owner, or under the owner's direction. It is not shown that the owner adopted the statement or put it

[6] Det Forende Dampskibs Selskab *v.* Insurance Co. of North America, 31 Fed. (2d) 658, 660 (Certiorari denied, 280 U. S. 571.).

[7] U. S. C., Title 28, § 250 (1).

[8] The Alpin, 23 Fed. 815, 819; The Santa Anna Maria, 49 Fed. 878, 879.

forth as an authorized statement. In this situation the statement had no binding force as a stated account or otherwise. As was explained by Lord Herschell when speaking for the Judicial Committee of the Privy Council in *Wavertree Sailing Ship Company* v. *Love*, L. R., (1897) App. Cas. 373,—

"The right to receive and the obligation to make general average contribution existed long before any class of persons devoted themselves as their calling to the preparation of average statements. It was formerly, according to Lord Tenterden, the practice to employ an insurance broker for the purpose. The shipowner was not bound to employ a member of any particular class of persons or indeed to employ any one at all. He might if he pleased make out his own average statement, and he may do the same at the present time if so minded. If he engages the services of an average stater, it is merely as a matter of business convenience on his part."

What we have said suffices to show that the claim accrued more than six years before the suit was begun, and therefore was barred by the statute.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.